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THE QUARTERLY LAW JOURNAL.

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ON THE PRESENT VALUE OF DOWER RIGHTS—VESTED AND CONTINGENT.

Suppose that the husband is dead and the right of dower vested; the property worth \$50, and the annual rent \$3. The widow will be entitled to one dollar per annum for life. What is its present value? If the duration of her life were ascertained, the present value of the annuity would be a sum, which placed at compound interest, would pay the annuity and be just exhausted at her death. But the duration of her life is uncertain. The only certainty is, that according to the table of mortality she cannot possibly live longer than her 99th year, and may die at any time. She has, then, a chance of receiving the annuity at the expiration of each year up to the 99th, and her interest in the annuity of each year is worth the amount of it multiplied by her chance of getting it.

Suppose the case of a widow 93 years of age; according to the Wigglesworth table of mortality, 2 Robinson's Practice, 381, old edition, out of a certain number of persons at birth, 4893, only 30 will attain the age of 93 years. Of this number 23 will live a year longer, 16 will live two years. &c., up to the 99th year, when only one will be living, and that one will die before the expiration of the 100th year, not living to receive the annuity then payable. Now as 23 out of the 30 live until the end of the year, and 7 die before that time, the probability of her living at that time will be represented by the fraction $\frac{23}{30}$, and the possibility of her death by the fraction $\frac{7}{30}$. If she lives she will receive the annuity—if she dies it will go to those entitled in remainder. Then the \$1 payable at the expiration of the first year, or, 9434, its present value, should be divided between

the widow and the remainderman in the proportion of their respective chances:

That is to the widow $23\text{-}30 \times 9434 = 7232\ 22\text{-}30$.

“ remainderman $7\text{-}30 \times 9434 = 2201\ 8\text{-}30 = 9434$.

The sum payable at the expiration of the second year will be divided in like proportion, that is to the widow the 16-30th part, and the residue, the 14-30th part, to the remainderman. Hence we have the following table, showing the present value of her interest:

TABLE No. 1.

Number of years.	Probability of living the No. of years in the first column.	Present value of \$1 payable at number of years stated in first column.	Portion of annuity of each year to which widow is entitled.
1	23-30	9434	7232 506-690
2	16-30	8900	4746 460-690
3	10-30	8396	2798 460-690
4	5-30	7921	1320 115-690
5	2-30	7473	0498 138-690
6	1-30	7050	0235
		4,91,74	1,68,31 299-690

To ascertain the rule for determining the present value of a contingent right of dower, suppose the case of a husband 94 years of age, and a wife 93; and that the annuity of one dollar per annum is payable to A while both are living, to B when both are dead, to C while the wife survives the husband, and to D while the husband survives the wife. According to the table of mortality both will be dead after the expiration of six years, B receiving certainly the whole annuity after that time; A, C, and D having no possible chance of receiving any portion after that time. Hence the annuity for the six years alone is subject to division, and the question is what portion of the present value of the annuity for six years shall each of the parties A, B, C and D receive.

It is manifest according to the principles before stated that the present value of the sum payable at the expiration of each year must be divided between the parties in the proportion of the fractions respectively representing the chance of each for receiving it; and as it is certain, a physical certainty, that the husband and wife will both be living, or both dead, or wife living and husband dead, or husband living and wife dead, at the expi-

ration of either of the six years, the sum of the fractions, representing respectively, the probability of each event, must be equal to a unit, which, in the mathematics of probabilities, is the symbol of certainty.

The death of each and their living are independent events, and the probability that any two of them will concur is ascertained by multiplying the separate probabilities of each event. If the probability that the husband will be living at the expiration of a year is one third, and the probability that the wife will be living is one third, then the probability that both will be living is $1/3 \times 1/3 = 1/9$. But the question may be asked what is the authority for this? The answer is, that is conceded by every author who has written upon the subject of the mathematics of probabilities. If this is not satisfactory, then it may be answered that it is capable of the same ocular demonstration as that $2 \times 2 = 4$, or $4 - 1 = 3$, or $2 - 8 = 4$, or that the area of a square is equal to the product of the two sides, or any other proposition, the proof of which may be made palpable to sense and sight,

In throwing a half dollar the chance that the head will be up is one half, for the reason that it must come head or tail, and the chances are equal, two in all and one for each event. If the chance for a head the first throw is one half, and the chance for a head the second throw is one half, then the chance for a head twice in succession is $\frac{1}{2} \times \frac{1}{2} = \frac{1}{4}$; that is, the result of the two throws must of necessity be two heads, or two tails, or a head and a tail, or a tail and a head, and as one of these four must happen, and the chances of each are equal, one fourth represents the probability of each.

Or suppose there are three males, whom we designate M 1,—M 2,—M 3,—and three females whom we designate F 1,—F 2,—F 3,—and it is admitted that one of each will die each year. What is the probability that M 1 and F 1 will die during the first year. The chance that M 1 will die during the first year is $\frac{1}{3}$, the chance that F 1 will die during the first year is $\frac{1}{3}$, and the chance that both will die is $\frac{1}{3} \times \frac{1}{3} = 1/9$. For it is manifest that the two who die during the first year will be M 1,—F 1,—or M 1,—F 2,—or M 1,—F 3,—or M 2,—F 1,—or M 2,—F 2,—or M 2,—F 3,—or M 3,—F 1,—or M 3,—F 2,—or M 3,—F 3. It must of necessity be one of these nine pairs, and as the chances for each are equal, that of M 1,—F 1,—and each of the others, is one ninth.

To take another illustration of the principle, what is the chance that M 1 will be living and F 1 dead at the expiration of the first year? As but one of the males die during the year, and two are living at the end of it, the chance that M 1 will

live is $\frac{2}{3}$; as before stated the chance that F 1 will die is $\frac{1}{3}$; and the chance that M 1 will live and F 1 will die is $\frac{2}{3} \times \frac{1}{3} = 2-9$. Now it is manifest that there must be two males living and one female dead at the expiration of the year, and this combination must of necessity be either—

- | | | |
|-----------------------|-----------------------|-----------------------|
| 1. M 1,—M 2,—and F 1. | 4. M 1,—M 3,—and F 1. | 7. M 2,—M 3,—and F 1. |
| 2. M 1,—M 2,—and F 2. | 5. M 1,—M 3,—and F 2. | 8. M 2,—M 3,—and F 2. |
| 3. M 1,—M 2,—and F 3. | 6. M 1,—M 3,—and F 3. | 9. M 2,—M 3,—and F 3. |

The chance for each of these combinations is the same, and as there are nine of them, the chance for each is 1-9. The combination M 1 living and F 1 dead appears in two of the series, the 1st and 4th, hence there are two chances out of nine in favour of its happening, and the probability is represented by the fraction 2-9. Hence it is manifest that in matters of life and death, as in all other events, the probability of the concurrence of any two independent events of life or death is ascertained by multiplying the two separate probabilities. By the application of this rule we have in the case just stated, the chance of

M 1 living, F 1 living, at end of 1s. year,	$\frac{2}{3} \times \frac{2}{3} = 4-9$.
M 1 dead, F 1 dead, " " "	$\frac{1}{3} \times \frac{1}{3} = 1-9$.
M 1 living, F 1 dead, " " "	$\frac{2}{3} \times \frac{1}{3} = 2-9$.
M 1 dead, F 1 living, " " "	$\frac{1}{3} \times \frac{2}{3} = 2-9$.

The sum of the several chances $4-9 \times 1-9 \times 2-9 \times 2-9 = 9-9 = 1$.

Now if we apply the same mode of calculation to the case of the wife 93 years of age, and the husband 94, we will ascertain the several portions of the annuity which A, B, C, and D are respectively entitled to receive. By the table of mortality there are 30 persons who attain the age of 93; of these 7 die during the first year and 23 are living at the end of it. The probability then that the wife will be living at the end of the first year is 23-30, and that she will be dead is 7-30. By the table of mortality 23 persons attain the age of 94 years, and of this number 7 die during the first year. The probability then that the husband will be dead at the end of the first year is 7-23; that he will be living is 16-23; Hence the probability that at the end of the first year

Husband living and wife living is	$16-23 \times 23-30 = 368-690$.
Do. dead do. dead	$7-23 \times 7-30 = 49-690$.
Do. living do. dead	$16-23 \times 7-30 = 112-690$.
Do. dead do. living	$7-23 \times 23-30 = 161-690$.

The sum of the several probabilities being—

$$368-690 \times 49-690 \times 112-690 \times 161-699 = 1.$$

The present value of \$1 payable at the expiration of the first year is ,9484, and the portion which each of the parties is enti-

tled to receive is ascertained by multiplying this sum by the chance of receiving it; and we have the following results:

A's portion—who receives during joint lives of husband and wife, is.....	368-690 x ,9434 = ,5031 322-690
B's portion—who receives after husband and wife are both dead, is.....	49-690 x ,9434 = ,0669 656-690
C's portion—who receives whilst wife survives the husband, is.....	161-690 x ,9434 = ,2201 184-690
D's portion—who receives whilst the husband survives the wife, is.....	112-690 x ,9434 = ,1531 218-690
Total,.....	<u>,9434</u>

Making the same calculation for each of the six years, we have the following tables :

TABLE No. 2.

Showing portion to which A is entitled.

Number of years.	Chance that wife will be living at the number of y's stated in the 1st column.	Chance that husband will be living at the number of y's stated in 1st column.	Present value of \$1 payable at number of years in 1st column.	Portion to which A is entitled, who receives whilst husband and wife are both living.
1	23-30 x	16-23 x	,9434 =	,5031 322-690
2	16-30 x	10-23 x	,8900 =	,2063 530-690
3	10-30 x	5-23 x	,8396 =	,0608 280-690
4	5-30 x	2-23 x	,7921 =	,0114 550-690
5	2-30 x	1-23 x	,7473 =	,0021 456-690
6	1-30 x	0-23 x	,7050 =	,0000
			4,0174	7840 68-690

TABLE No. 3.

Showing portion to which B is entitled.

Number of years.	Chance that wife will be dead at number of years in 1st column.	Chance that husband will be dead at number of y's in 1st column.	Present value of \$1 payable at number of years in 1st column.	Portion to which B is entitled, who receives when husband and wife are both dead.
1	7-30 x	7-23 x	,9434 =	,0669 656-690
2	14-30 x	13-23 x	,8900 =	,2347 370-690
3	20-30 x	18-23 x	,8396 =	,4380 360-690
4	25-30 x	21-23 x	,7921 =	,6026 585-690
5	28-30 x	22-23 x	,7473 =	,6671 378-690
6	29-30 x	23-23 x	,7050 =	,6315
			4,9174	26911 279-690

TABLE No. 4.

Showing portion to which C is entitled.

Number of years.	Chance that wife will be living at number of years stated in 1st column.	Chance that husband will be dead at number of years stated in 1st column.	Present value of \$1 payable at number of years stated in 1st column.	Portion to which C is entitled, who receives whilst wife survives husband.
1	23-30 x	7-23 x	,9434 =	,2201 184-690
2	16-30 x	13-23 x	,8900 =	,2682 620-690
3	10-30 x	18-23 x	,8396 =	,2190 180-690
4	5-30 x	21-23 x	,7921 =	,1205 355-690
5	2-30 x	22-23 x	,7473 =	,0476 372-690
6	1-30 x	23-23 x	,7050 =	,0235
				4,9174 8991 231-690

TABLE No. 5.

Showing portion to which D is entitled.

Number of years	Chance that wife will be dead at number of years stated in 1st column.	Chance that husband will be living at the number of y's stated in 1st column.	Present value of \$1 payable at number of years stated in 1st column.	Portion to which D is entitled, who receives whilst husband survives the wife.
1	7-30 x	16-23 x	,9434 =	,1531 218-690
2	14-30 x	10-23 x	,8900 =	,1805 550-690
3	20-30 x	5-23 x	,8396 =	,1216 560 690
4	25-30 x	2-23 x	,7921 =	,0573 680-690
5	28-30 x	1-23 x	,7473 =	,0303 174-690
6	29-30 x	0-23 x	,7050 =	,0000
				4,9174 5431 112-690

By these tables the present value of the whole annuity is \$4,9174.

A's portion by table No. 2,..... ,7840 68-690

B's portion " " No. 3,..... 2,6911 279-690

C's portion " " No. 4,..... ,8991 231-690

D's portion " " No. 5,..... ,5431 112-690

\$4,9174

The portion of C ,8991 231-690, is the amount which the wife is entitled to receive for her contingent right of dower in real estate of the fee simple value of fifty dollars, the interest upon one third of that sum, her dower if her husband were dead, being \$1 per annum. The portion of an estate of the fee simple value of fifty dollars being thus ascertained, if we double it of course we have the portion of one hundred dollars—in other words, the per cent by which we may determine the value of a contingent right of dower in an estate of any amount.

The rule for ascertaining the present value of an annuity payable to the wife whilst she survives her husband—which is a contingent right of dower—as stated in the appendix to Matthew's Guide to Executors, Law Library, Vol. IX, is, from the present value of an annuity payable during the life of the wife, deduct *one half* of the present value of an annuity payable during the joint lives of husband and wife. Why deduct one half? Why not the whole of the annuity on the joint lives? The subject to be divided, to be deducted from, is an annuity during the life of the wife. That is the whole. What are the

parts? The present value of an annuity payable whilst the wife survives the husband, is one part, and the present value of an annuity payable whilst husband and wife are both living, is another part. These parts are separate and distinct, and in no respect merge into each other. They include the whole subject, and when they are taken out there is nothing left of it. Now the amount of the whole, and of one of the parts being given, by what process shall we determine the amount of the other part? A most difficult mathematical problem, for the solution of which the ashes of the dead have been sifted to find an Archimedes or Euclid, and the result is stated by Matthews.

One dozen apples are to be divided between two boys, and one is to get 7; these are the facts agreed. By the rule of Matthews the solution is from the whole, 12, deduct $\frac{1}{2}$ of 7 = $3\frac{1}{2}$, and the residue $8\frac{1}{2}$ is the number which the other boy gets. Then the twelve apples are to be divided, 7 to one boy and $8\frac{1}{2}$ to the other, making in all $15\frac{1}{2}$; the solution of the problem having added $3\frac{1}{2}$ to the number of apples.

An annuity of one dollar per annum payable during the life of a wife 93 years of age is by table No. 1 worth \$1,6831 299-690; an annuity payable during the joint lives of a wife 93 years of age, and of a husband 94 years of age is worth by table No. 2, \$7840 68-690. By the rule of Matthews, to find the value of the annuity payable whilst the wife survives the husband, from the value of the annuity payable during the life of the wife,

Deduct one half of the annuity on their joint lives, half of	\$1,6831 299-690
,7840 68-690,	,3920 34-690
The present value of the annuity whilst wife survives the husband, is	1,2911 265-690
Now by the terms of the problem, the other part—the annuity on the joint lives, is	,7840 68-690
The parts added making	\$2,0751 333-690

The result in this case, as in the other, showing that the amount of the subject of division has largely increased during the progress of the solution of the problem.

Again, by the rule of Matthews the wife gets one half of the annuity during the joint lives of herself and husband, when, by the terms of the problem, she can take nothing during his life, but only after his death. If the joint existence terminates by her death, then the whole annuity ceases—if by his death, the annuity during her survivorship commences.

The true rule is, deduct not half, but the whole of the annuity for the joint lives. To show that this is correct, suppose an annuity is granted to A during the life of B, but upon condition

that he shall pay it to B while she survives C. A will receive the annuity during the joint lives of B and C, and B will receive all, if anything is left of it—that is if the joint existence is terminated by the death of B, she receives nothing—if by the death of C, then B receives the annuity during the residue of her life.

Tables Nos. 1, 2, and 4, furnish an unanswerable demonstration of the rule. From the probability that the wife will be living at the expiration of the first year, as shown by table No. 1,

	28-30	= 529-690
--	-------	-----------

Deduct the probability that both will be living at the expiration of the first year, as shown by table No. 2,

	23-30 x 16-23	= 368-690
--	---------------	-----------

And the result is the fraction representing the probability that wife will be living and husband dead, as shown by table No. 4,

		,61-690
--	--	---------

So too we have wife's portion of annuity payable the first year by table No. 1,

		,7282 506-690
--	--	---------------

Deduct portion to which party is entitled who holds during joint lives, as shown by table No. 2,

		,5081 322-690
--	--	---------------

And the result is the portion of the party who receives upon the contingency that wife is living and husband dead, as shown by table No. 4,

		,2201 184-690
--	--	---------------

We have the whole annuity of the wife by table No. 1,

		1,6881 299-690
--	--	----------------

Deduct annuity payable during joint lives by table No. 2,

		,7840 68-600
--	--	--------------

Value of annuity payable whilst wife survives the husband, by Table No. 4,

		,8991 231-690
--	--	---------------

Hence it is manifest that if from the probability that the wife will be living at the end of each year in the series, we deduct the probability that the husband and wife will both be living, the result is the fraction representing the probability that husband will be dead and wife living; and, as a necessary consequence, it is true, that if from the present value of the annuity payable whilst the wife lives, we deduct the present value of an annuity payable whilst the husband and wife are both living, the remainder will be the present value of an annuity payable whilst the wife survives the husband.

The annexed tables are taken from the American Almanac of 1835. It will be found upon examination that table A corre-

sponds precisely with results obtained by calculation similar to that of table No 1.

It will also be found that table B corresponds very nearly with the results of calculations made according to table No. 4. For the purpose of testing the accuracy of table B, we have made the following calculations :

By the table, where the husband is 50 and wife 42,	
the value is,	5,81
By calculation according to table No. 4, we find it,	5,41
Excess,	,10
By the table, where the husband is 80 and wife 80,	
the value is,	8,20
By calculation we find it,	8,28
Excess,	,8
By the table, where the husband is 84 and wife 90,	
the value is,	1,92
By calculation we find it,	2,04
Excess,	,2

The excess in the result of a calculation being one tenth of one per cent, or \$1 in \$1000 in favour of the wife. Table B is based upon the Carlyle Table of Mortality ; whilst our calculations were made according to the Wigglesworth Table. In most cases the discrepancy of the tables is but trifling, and unless the amount in controversy is very large the difference between table B and the result of a calculation according to the Wigglesworth Table, will not pay for the labour required to make the calculation.

E. F. P.

Lexington, November, 1858.

TABLE A.

Showing value of a vested right of dower in an estate of the fee simple value of \$100.

AGE.	VALUE.	AGE.	VALUE.	AGE.	VALUE.	AGE.	VALUE.
0	17,17	24	24,10	48	21,41	72	11,98
1	22,54	25	24,05	49	21,17	73	11,50
2	23,84	26	23,97	50	20,91	74	11,04
3	24,77	27	23,88	51	20,63	75	10,57
4	25,40	28	23,78	52	20,35	76	10,08
5	25,60	29	23,69	53	20,05	77	9,59
6	25,77	30	23,59	54	19,74	78	9,10
7	25,85	31	23,50	55	19,42	79	8,63
8	25,86	32	23,42	56	19,08	80	8,19
9	25,81	33	23,33	57	18,72	81	7,72
10	25,72	34	23,25	58	18,34	82	7,27
11	25,55	35	23,17	59	17,94	83	6,88
12	25,36	36	23,06	60	17,53	84	6,60
13	25,16	37	22,94	61	17,08	85	6,53
14	24,94	38	22,83	62	16,61	86	7,01
15	24,71	39	22,72	63	16,12	87	5,55
16	24,63	40	22,61	64	15,59	88	5,23
17	24,56	41	22,57	65	15,03	89	5,08
18	24,49	42	22,40	66	14,63	90	5,46
19	24,42	43	22,30	67	14,22	91	4,84
20	24,36	44	22,21	68	13,80	92	4,10
21	24,30	45	22,10	69	13,36	93	3,37
22	24,23	46	21,88	70	12,91	94	2,65
23	24,16	47	21,65	71	12,45	95	2,04

TABLE B.

Showing the present value of a contingent right of dower in real estate of the fee simple value of \$100.

	22	26	30	32	34	36	38	40	42	44	46	48	50	52
16	3.68	4.10	4.58	4.85	5.14	5.43	5.73	6.06	6.42	6.81	7.25	7.74	8.42	9.18
18	3.57	3.99	4.51	4.76	5.03	5.29	5.65	5.99	6.35	6.73	7.08	7.57	8.21	8.96
20	3.45	3.88	4.38	4.64	4.92	5.15	5.49	5.86	6.22	6.60	6.90	7.38	8.00	8.74
22	3.33	3.77	4.25	4.46	4.74	5.00	5.33	5.69	6.03	6.43	6.72	7.19	7.79	8.52
24	3.23	3.65	4.11	4.32	4.57	4.85	5.17	5.52	5.85	6.18	6.54	6.99	7.58	8.30
26	3.12	3.53	3.97	4.18	4.42	4.70	5.01	5.35	5.60	5.98	6.36	6.79	7.37	8.08
28	3.01	3.41	3.83	4.03	4.26	4.54	4.84	5.17	5.47	5.78	6.17	6.59	7.15	7.85
30	2.90	3.28	3.69	3.88	4.10	4.38	4.66	4.99	5.28	5.58	5.96	6.38	6.93	7.61
32	2.79	3.15	3.55	3.73	3.94	4.21	4.48	4.80	5.09	5.38	5.74	6.16	6.70	7.38
34	2.68	3.02	3.40	3.57	3.78	4.03	4.30	4.60	4.88	5.17	5.51	5.92	6.45	7.10
36	2.56	2.89	3.25	3.41	3.61	3.85	4.11	4.40	4.66	4.94	5.26	5.66	6.18	6.83
38	2.44	2.76	3.10	3.25	3.44	3.67	3.92	4.19	4.44	4.70	5.00	5.39	5.90	6.53
40	2.32	2.62	2.95	3.09	3.27	3.49	3.72	3.98	4.22	4.46	4.74	5.11	5.61	6.22
42	2.20	2.48	2.79	2.93	3.10	3.30	3.52	3.76	3.99	4.22	4.48	4.83	5.31	5.90
44	2.07	2.34	2.63	2.76	2.92	3.11	3.32	3.54	3.75	3.98	4.22	4.55	4.99	5.57
46	1.94	2.21	2.47	2.59	2.73	2.92	3.12	3.32	3.50	3.71	3.96	4.26	4.67	5.22
48	1.85	2.10	2.31	2.42	2.54	2.76	2.91	3.10	3.25	3.44	3.71	3.97	4.35	4.85
50	1.71	1.92	2.15	2.24	2.35	2.56	2.71	2.87	3.00	3.17	3.49	3.75	4.03	4.48
52	1.54	1.74	1.95	2.06	2.18	2.31	2.45	2.60	2.76	2.90	3.18	3.46	3.78	4.12
54	1.40	1.58	1.77	1.87	1.97	2.08	2.21	2.34	2.48	2.63	2.81	3.05	3.37	3.77
56	1.30	1.44	1.61	1.70	1.79	1.89	1.99	2.10	2.22	2.35	2.50	2.72	3.00	3.36
58	1.17	1.32	1.48	1.56	1.64	1.72	1.81	1.90	2.00	2.11	2.24	2.39	2.59	2.87
60	1.03	1.17	1.32	1.40	1.48	1.56	1.65	1.74	1.84	1.95	2.07	2.20	2.35	2.57
62	0.91	1.03	1.16	1.23	1.30	1.37	1.45	1.54	1.63	1.73	1.85	1.99	2.17	2.38
64	0.82	0.92	1.03	1.09	1.16	1.23	1.30	1.37	1.44	1.51	1.61	1.75	1.93	2.15
66	0.74	0.82	0.92	0.97	1.02	1.08	1.13	1.19	1.25	1.31	1.37	1.47	1.63	1.85
68	0.65	0.73	0.82	0.86	0.91	0.96	1.01	1.06	1.10	1.15	1.20	1.25	1.36	1.54
70	0.54	0.62	0.70	0.74	0.78	0.83	0.87	0.92	0.97	1.02	1.07	1.12	1.17	1.27
72	0.44	0.50	0.57	0.61	0.65	0.69	0.73	0.77	0.81	0.85	0.90	0.96	1.03	1.11
74	0.38	0.43	0.49	0.52	0.55	0.58	0.61	0.64	0.68	0.71	0.75	0.86	0.89	0.98
76	0.35	0.38	0.42	0.45	0.48	0.51	0.53	0.56	0.58	0.60	0.63	0.67	0.73	0.82
78	0.30	0.34	0.38	0.40	0.43	0.45	0.47	0.49	0.50	0.52	0.53	0.55	0.60	0.68
80	0.24	0.28	0.32	0.34	0.36	0.38	0.41	0.43	0.44	0.46	0.47	0.48	0.50	0.55
82	0.20	0.22	0.25	0.27	0.29	0.32	0.34	0.36	0.38	0.40	0.41	0.43	0.45	0.47
84	0.17	0.18	0.21	0.23	0.24	0.25	0.27	0.29	0.30	0.32	0.34	0.37	0.40	0.42
86	0.14	0.16	0.18	0.19	0.20	0.21	0.22	0.23	0.25	0.26	0.27	0.29	0.32	0.36
88	0.13	0.15	0.17	0.18	0.19	0.20	0.21	0.21	0.22	0.22	0.23	0.24	0.26	0.30
90	0.11	0.13	0.15	0.16	0.17	0.18	0.19	0.20	0.21	0.21	0.22	0.22	0.23	0.25
	22	26	30	32	34	36	38	40	42	44	46	48	50	52

The line of figures at the top, commencing 22, 26, 30, &c., represents the age of the husband, while the column at the left side, commencing 16, 18, &c., represents the age of the wife. To find the value in any given case, begin at the top of the column containing the age of the husband, and continue down it to the figure on the line which begins with the age of the wife— and this figure represents the value. In the case of a husband 60 and wife 60 the value is \$4.41—husband 40 and wife 28 it is \$5.17, &c.

TABLE B—CONTINUED.

Showing the present value of a contingent right of dower in real estate of the fee simple value of \$100.

	54	56	58	60	62	64	66	68	70	72	74	76	80	84
16	9,93	10,69	11,62	12,48	13,20	13,86	14,67	15,63	16,62	17,74	18,53	19,27	20,78	22,10
18	9,71	10,51	11,40	12,24	12,96	13,63	14,45	15,39	16,41	17,51	18,31	19,03	20,48	21,86
20	9,49	10,30	11,18	12,03	12,72	13,40	14,22	15,15	16,18	17,26	18,08	18,78	20,18	21,62
22	9,27	10,09	10,95	11,80	12,48	13,17	13,98	14,90	15,93	16,99	17,85	18,56	19,87	21,34
24	9,05	9,86	10,71	11,56	12,23	12,94	13,73	14,63	15,66	16,74	17,60	18,25	19,57	21,05
26	8,83	9,62	10,47	11,30	11,97	12,69	13,46	14,35	15,37	16,46	17,34	17,96	19,26	20,77
28	8,60	9,37	10,22	11,03	11,70	12,42	13,18	14,05	15,06	16,15	17,06	17,66	18,96	20,47
30	8,35	9,11	9,96	10,75	11,42	12,13	12,88	13,74	14,74	15,82	16,75	17,34	18,65	20,14
32	8,08	8,84	9,69	10,46	11,13	11,82	12,57	13,42	14,41	15,48	16,40	17,00	18,32	19,78
34	7,80	8,56	9,40	10,15	10,82	11,50	12,25	13,09	14,07	15,12	16,01	16,65	17,96	19,39
36	7,51	8,26	9,08	9,82	10,49	11,16	11,92	12,75	13,71	14,74	15,62	16,28	17,57	19,00
38	7,21	7,95	8,75	9,48	10,13	10,80	11,57	12,39	13,33	14,34	15,22	15,89	17,15	18,59
40	6,89	7,62	8,41	9,13	9,76	10,42	11,19	12,00	11,93	13,93	14,80	15,47	16,72	18,16
42	6,56	7,27	8,04	8,76	9,37	10,02	10,78	11,58	12,50	13,52	14,37	15,03	16,26	17,70
44	6,21	6,91	7,65	8,37	8,96	9,60	10,34	11,13	12,04	13,08	13,92	14,56	15,76	17,22
46	5,84	6,53	7,25	7,95	8,52	9,15	9,87	10,65	11,54	12,59	13,52	14,06	15,22	16,70
48	5,45	6,10	6,84	7,49	8,04	8,66	9,37	10,15	11,00	12,03	12,72	13,50	14,65	16,10
50	5,05	5,64	6,17	7,01	7,52	8,12	8,83	9,61	10,43	11,39	11,90	12,87	14,05	15,41
52	4,63	5,22	5,56	6,22	6,97	7,54	8,24	9,02	9,82	10,68	11,27	12,16	13,32	14,63
54	4,21	4,78	5,18	5,72	6,30	6,92	7,59	8,37	9,18	9,97	10,72	11,37	12,81	13,77
56	3,80	4,30	4,81	5,33	5,85	6,37	6,89	7,68	8,48	9,26	9,62	10,50	12,01	13,12
58	3,27	3,79	4,39	4,96	5,50	6,00	6,46	6,89	7,77	8,56	8,64	9,37	10,90	12,06
60	2,89	3,31	3,83	4,41	4,95	5,47	5,98	6,48	6,98	7,85	8,08	8,69	9,99	11,23
62	2,64	2,97	3,36	3,82	4,33	4,87	5,43	6,00	6,57	7,15	7,72	8,28	9,36	10,37
64	2,41	2,70	3,03	3,39	3,78	4,22	4,71	5,25	5,84	6,47	7,14	7,76	8,84	9,70
66	2,12	2,43	2,74	3,06	3,39	3,74	4,12	4,55	5,04	5,60	6,22	6,88	8,05	9,02
68	1,79	2,09	2,44	2,77	3,07	3,38	3,69	4,02	4,39	4,82	5,32	5,89	7,08	8,08
70	1,43	1,67	1,98	2,36	2,70	3,01	3,32	3,65	3,94	4,27	4,65	5,09	6,15	7,12
72	1,22	1,36	1,57	1,85	2,17	2,50	2,84	3,18	3,53	3,88	4,24	4,61	5,38	6,23
74	1,08	1,20	1,35	1,54	1,77	2,03	2,33	2,67	3,05	3,43	3,77	4,11	4,80	5,49
76	0,94	1,09	1,25	1,42	1,59	1,76	1,94	2,16	2,43	2,76	3,15	3,60	4,35	5,03
78	0,79	0,94	1,12	1,29	1,45	1,60	1,75	1,90	2,08	2,31	2,61	2,98	3,78	4,46
80	0,64	0,77	0,94	1,10	1,26	1,41	1,56	1,71	1,87	2,06	2,28	2,54	3,20	3,85
82	0,52	0,60	0,71	0,84	1,00	1,16	1,33	1,50	1,68	1,87	2,07	2,29	2,75	3,28
84	0,45	0,50	0,58	0,68	0,79	0,90	1,03	1,18	1,36	1,57	1,81	2,04	2,45	2,80
86	0,40	0,45	0,51	0,58	0,66	0,74	0,83	0,94	1,08	1,25	1,44	1,66	2,09	2,48
88	0,35	0,41	0,48	0,55	0,62	0,69	0,76	0,83	0,92	1,04	1,20	1,39	1,79	2,17
90	0,29	0,35	0,42	0,51	0,60	0,68	0,75	0,81	0,87	0,96	1,08	1,23	1,57	1,92
	54	56	58	60	62	64	66	68	70	72	74	76	80	84

The line of figures at the top commencing 22, 26, 30, &c., represents the age of the husband, whilst the column at the left side, commencing 16, 18, &c., represents the age of the wife. To find the value in any given case, begin at the top of the column containing the age of the husband, and continue down it to the figure on the line which begins with the age of the wife—and this figure represents the value. In the case of a husband 60 and wife 60 the value is \$4,41—husband 40 and wife 28 it is \$5,17, &c.

PRECATORY TRUSTS.

Means v. McCree et als.

In Chancery—at Hayneville.

WADE KEYES—Chancellor.

1. Precatory Trusts. 2. Remoteness at the common law and under § 1302 Code (Ala.) 3. Principles of account between administrators of prior limitee, as administrators and as individuals, and subsequent limitee.

Martha Ann McCree, a married woman, had a separate estate, which was of both real and personal property. She made a will in which she declares :

“ 1. It is my will, wish and desire, that all just debts due by me, or on account of my estate or property, at my death, be promptly paid by my executor, hereinafter named.

2. I give, bequeath and devise unto Robert P. Means, the sum of five thousand dollars, to be paid him, the said Robert, in five annual payments, computing from my death as to time.

3. I give, bequeath and devise all the balance of my property and estate, both real, mixed and personal, also all *choses* in action and chattels to my beloved husband, Caleb P. McCree, to have and to hold said property and estate, real, mixed, personal, *choses* in action and chattels to him, the said Caleb P., his heirs and assigns forever, to his use, behoof and benefit in fee simple. But should my said husband die, without issue of his body, it is my wish and will he shall give all of said property to Robert P. Means.

4. I hereby constitute and appoint my said husband, Caleb P. McCree, executor of my last will and testament, hereby revoking,” &c.

The testatrix died about the first of March 1858, and the husband sued out letters testamentary, took possession of the estate, returned to the Probate Court “ no assets” and “ no debts,” except costs of Probate Court, and was thereupon, on final settlement, discharged as executor on the 8th of December, 1856. He retained possession of the property until the 19th day of October, 1857, when he died without having made any disposition of the property, and without issue at the death of his wife, and without having had issue subsequently—Robert P. Means now claims that, in the events which have occurred, he became entitled to all the property given to the husband, and that he is also entitled to as much of the legacy to him as was unpaid at the death of Caleb P. McCree.

Three questions are presented for decision :

1. Whether the words of the will create a trust in favor of complainant.
2. Whether such trust is void for remoteness.
3. Of what shall he have account.

1. Precatory trusts are nothing more nor less than express trusts. They are called *precatory* because words of recommendation, wishing, requesting, desiring, &c., that a person to whom property is given by will, shall at a certain time, or in a certain event, give the whole or a certain part of it to another, have been held to create a trust in favor of that other. Now, whatever may be said in condemnation of the cases which established such trusts, it cannot be maintained that they violated any principle of law or of equity. The only error, that can be imputed to them, is a mistake of the testator's intention ; for if it be admitted that the testator intended by such words to create a trust, it cannot then be denied that a trust is thereby created. This shows that each case depends upon construction of the words in that particular case ; but a construction of words becomes, like a principle, a rule of property, and is, therefore, as much as a principle, under the protection of the maxim *stare decisis*. It is necessary therefore that I should look into the cases to see if they have settled that the words "it is my wish and will he shall give all of said property to Robert P. Means," create a trust in his favor. And here I desire to express my dissent to the idea that a common-law court in this country may depart from a principle, or a construction of words which had been asserted and established in England, long before the Declaration of Independence, any more than it may depart in such cases from its own decisions. It is to the decisions of the English Courts, that we look for the body of the common law, and though we are not bound by their recent decisions, yet what certainty would there be in our system, if in the absence of a constitutional provision, a statute, and a judicial decision of our own, and in a case not affected by a change of our circumstances a client could not be advised that "such is the law: for it has been so held at Westminster for more than a century and a half." I think, therefore, I may say in regard to the English cases which establish precatory trusts, as Lord Eldon said in regard to another class of cases : "Whether the cases which have been decided have been rightly decided or not, there are cases in which it has been held that a remainder 'to my family,' operates as a devise to my heir-at-law. With respect to those cases, he must be a bold man, who, sitting in a judicial chair, would attempt to distrust them." *Might v. Atkyns*, 1 T. and R., 143.

I think it will be found, notwithstanding the strong language

of condemnation used by some of the Judges, that the English cases, ancient and modern, establish that the words "wish," "recommend," "desire," "well-knowing," "in full confidence," &c., *ex vi termini* import a trust; *unless it appear from the other words of the will that a trust was not intended.* The words "will and desire," were held to import a trust in *Eeles v. England*, (A. D. 1702,) 2 Vernon 466, and in *Forbes v. Ball*, (A. D. 1817,) 3 Mer. 436. Without however undertaking to cite the many English cases which are scattered so thickly through the books, I content myself with *Malin v. Keighly*, (A. D. 1794,) 2 Ves. 333. *Paul v. Compton*, (A. D. 1801,) 8 Ves. 376. *Meredith v. Heneage*, 1 Sim. 542, (A. D. 1824.) *Briggs v. Penny*, (A. D. 1851,) 8 Eng. L. & Eq. R. 231, and with such others as I shall find occasion to cite in a subsequent part of the opinion. The American cases which I have found recognizing the English doctrine, are *Harrison v. Harrison*, 2 Grat. 1. *Erickson v. Williams*, 1, N. H. R. 217. Coates appeal, 2 State (Penn.) R. 129. McKonkey's Appeal 13 *Id.* 253. *Lucas v. Lockhart*, 10 Sm. and Mat. 466. *Bull v. Bull*, 8 Con. 47. *Hunter v. Stembridge*, 12 Geo. R. 142.

The case of *Gilbert v. Chapin*, 19 Conn. 342, is said by the majority of the Court to be decided according to the English authorities, but they agree against the soundness of the general doctrine and that of course is but *dictum*. Two of the Judges dissented, and held that a trust was created.

The case of *Harper v. Phelps*, 21 Conn. 257, is not adverse. The cases of Pinnock's Estate, 20 State (Penn.) 268 and *Ellis v. Ellis*, 15 Ala. R. 296, seem to repudiate the English construction, and to hold that whether a trust is created must be determined in each case upon the plain and familiar sense of the words used in the will.

In the last case, the testator gave to his wife "my whole estate real and personal, after payment of my just debts, recommending her at the same time to make some small allowance, at her convenience, to each of my brothers and sisters: say to each one thousand dollars;" and it was held that no trust was created. The court say: "it is certainly true that technical language is not necessary to the creation of a trust. It is sufficient, if it clearly appear from the language employed by the testator, that it was his intention to create a trust; for the intention of the testator, deducible from an examination of the whole will, must in all cases be the pole-star to guide us to a correct conclusion." And again they say that the true rule is "to give such recommendatory expressions their natural, ordinary and familiar sense, and having arrived at the true inten-

tion of the testator, to let that intention, if lawful, be the rule of decision in the particular case."

It is clear, according to the English authorities, that the words of the will now before me *ex vi termini* import a trust, and that they also import a trust according to the American authorities, except the last two. Those two cases leave the question, as I have said, open to a construction of the words according to "their natural, ordinary and familiar sense." I think it may be asserted as a rule of construction, that if a testator shows by his will the force or meaning which he attaches to certain words, that a court is bound, in ascertaining his intention, to give that force or meaning to his words whenever they occur in the will, unless there be something in the will which releases from it. *Carnage v. Woodcock*, 2 Mun. 234. *Dugans v. Livingstone*, 15 Mo. 230. Now in the first item in this will, the testatrix says; It is my will, wish and desire that all just debts due by me, or on account of my estate or property, at my death be promptly paid by my executor hereinafter named." No one can contend that the words "*will, wish and desire,*" were used in that sentence as words of discretion; for it is clear from the character of the duty imposed, that the testatrix understood and used them as words imperative. Nor can it be said that "desire" adds anything to the imperative character of the clause, and therefore I conclude that when she afterwards used the words "it is my wish and will," that she also used them in the same imperative sense; unless something be shown which proves that she understood and used them differently in the subsequent clause. I cannot perceive that the word "wish," detracts from the force of the word "will," and I read the sentence therefore, "It is my will he shall give all of said property to Robert P. Means." She was making a will and she used the very word by which such disposition of property is technically and popularly known. It imports according to "its natural, ordinary, and familiar sense," as well as its legal sense, an imperative disposition of property. Suppose the will had read, "I give my whole estate to my husband, Caleb P. McCree and his heirs, and my will is, that after payment of my debts, he shall give 'all of said property' to Robert P. Means, if he shall then be alive." Would not the husband have taken in trust? Is there any difference in principle between one event and another, so far as the intention to create a trust is concerned? In the one case, it is in the event that Means shall be alive at the time when the debts shall have been paid: in the other it is in the event that her husband "shall die without issue." The very idea of a trust is that property is conveyed to one person, with discretion to hold it for the benefit of another, or to convey it to another uncondition-

ally, or upon the happening of a certain contingency. The "will" of the testatrix is what I am bound to have executed, "if it be not illegal," and she has declared it to be her "will," that in a certain event the property shall be given to Robert P. Means, and that seems conclusive upon the *import* of the words.

It is true, the learned Judge, who delivered the opinion in *Ellis v. Ellis* (*supra*) cited *Forbes v. Ball*, 3 Mer. 437, in which the words "will and desire" were used, and he seems to repudiate it, as well as the other earlier English cases; but the case before the court did not require a decision upon the force of those words, and I do not think the decision is an authority adverse to a trust in this case.

If the words be sufficient to raise a trust, the next question is: Whether there is anything in the will inconsistent with its existence. It is said that no executory devise or bequest is valid if the prior taker has the absolute power of disposal, and that McCree had such power by the terms of the gift to him. The words are "to the said Caleb P., his heirs and assigns forever, to his use, behoof, and benefit in fee simple." If the words "assigns to his use, behoof and benefit" be omitted, the remaining words present nothing more than a common case of a fee upon which a conditional limitation or trust may be limited.

In *Meredith v. Heneage*, 1 Sim. 542, the words in regard to the realty are, "her heirs and assigns forever," and as to the personalty, "her executors, administrators, and assigns forever," and yet nothing was said in the opinion about them, although the point was made. So in *Macnab v. Whitbread*, 17 Brav. 299, the words to "Charlotte Macnab, her heirs, executors, administrators and assigns, absolutely and forever," "and yet the Master of the Rolls made no point on them against the trust. These were cases, however, in which the trusts were held to be invalid for another reason. But in *Parsons v. Baker*, 18 Ves. 476, the words of gift are to "Richard Cope Hopton, his heirs, and assigns forever," and then the words: "Not doubting, in case he should have no child or children of his own body, but that he will dispose and give my said real estate to the female descendants," &c., and it was held that a trust was created. And so in *Pierson v. Garnet*, 2 Bro. C. C. 38, 226, the gift is to A. "his executors, administrators, and assigns," adding, "and it is my dying request to the said A., that if he shall die without leaving issue living at his death. the said A. do dispose of what fortune he shall receive under this my will to, and among the descendants of my late aunt, A. C., his grandmother, in such manner and proportion as he shall think proper," and it was held by the Master of the Rolls, and afterwards by the Lord Chancellor, that a trust was created in the event for the

descendants of A. C. See also *Briggs v. Penny*, 8 Eng. L. & Eq. 281.

In *Wood v. Cox*, 15 Eng. Ch. R. 317, the gift was to C., "his heirs, executors, administrators and assigns, for his and their own use and benefit forever, trusting and wholly confiding in his honor, that he will act in strict conformity with my wishes." On the same day the testatrix dictated another testamentary paper, which was as follows: "Miss Mary and Miss Betsy Trussell for life 100*l* a year, to be equally divided between them. Mrs. James Jones 50*l*. *per annum* for life. Miss Clements 100*l*. as a present," and many other persons and sums were named in the same way, and at the bottom was written by the testatrix: "Such is the wish of Mary Crompton." The Master of the Rolls held that C. took the property, subject to the payment of the several sums mentioned in the last paper, and then in trust for the next of kin of the testatrix. An appeal was taken, and the Lord Chancellor held that C. took the property subject to the payment of the sums specified, and then not in trust, but for his own benefit. 2 Myl. and Cr. 684. Neither the Master of the Rolls, nor the Lord Chancellor, gave any weight to the word "assigns." The Lord Chancellor said, however, "before any construction can be adopted, making Sir George Cox a trustee of the whole property, the words "for his use and benefit" must be expunged from the will, or, by reason of some irresistible evidence derived from other parts of the testamentary disposition, treated as if they had never been inserted; a construction which nothing but absolute necessity would justify." And again he says: "It was argued that the words trusting and wholly confiding in his honor that he will act in strict conformity with my wishes, "prove that the testatrix did not use the words "for his own use and benefit "in an absolute and unrestricted sense. Certainly she did not use those words in their absolute and unrestricted sense, as to the whole of her property, namely, as to that part which would be required to pay the legacies given to others, or *in other words to execute her wishes*."

And so in the case now under consideration, the words "it is my wish and will, he shall give all of said property to Robert P. Means," prove that the words "his heirs and assigns forever, to his use, behoof, and benefit in fee simple," were not used "in an absolute and unrestricted sense," and they show on the contrary the absolute meaning of the words of gift are restricted in one event, viz. death, "without issue." It is certainly a rule of construction that a will shall be so read, if it may be, that all its words and parts shall have effect. By construing this will to mean that Caleb P. McCree took an estate in fee in the land and the personal property absolutely, and that he took the prop-

erty "for his use, behoof, and benefit," forever, if he should not "die without issue," but if he should "die without issue," that Robert P. Means should take "all of said property" the whole will is reconciled, and as the Lord Chancellor said in the last cited case, there is "no inconsistency in any of the dispositions, no repugnancy in any of the clauses, no forced construction to be adopted, and no words to be omitted." And so it seems to me that "absolute necessity not only justifies, but requires me to hold that a trust was intended by the testatrix in the event specified.

This is fully sustained by *Wace v. Mallard*, 11 Eng. L. and Eq. R. 4, A. D. 1852. In that case the words were, "I give, devise, and bequeath all my estate and effects whatsoever and wheresoever, and of what nature or quality soever which I shall or may be possessed of, interested in, or entitled unto, either in possession, or expectancy at the time of my decease, unto my dear wife Mary Mallard, her heirs, executors, administrators or assigns, to and for her sole use and benefit; in full confidence that she, my said wife, will in every respect appropriate and apply the same into and for the benefit of all my children." Mrs. Mallard, by her will, gave the property to the children for their lives with remainder to their issue, and it was held "that the widow took a life estate with a power of appointment among the children, and the gifts by will to the children for life were valid, but the remainders over were an excess of the power. The children of the testator took the unappointed part of the property as joint tenants." And so in *Stone v. Maule*, 3 Sim. 296, the testator bequeathed the residue of his personal estate to H. Doddridge for his own use and benefit, and in case H. Doddridge should happen to die in the testator's lifetime or afterwards, without having child or children then over. Doddridge survived the testator, and died without having had a child, and the limitation over was held to be good: and this shows that the words for "his use, behoof, and benefit are not repugnant to a limitation over directly in a certain event, and, of course, not repugnant to such a limitation by way of trust. And here I think may be added, that the words, "all of said property," in directing the gift to Robert P. Means, furnish a full answer to the proposition that the testatrix intended that her husband should have the power of disposing of any part of the property, otherwise than subject to the contingent trust in favor of the complainant.

There is a question asked *arguendo* by the learned judge who delivered the opinion in *Ellis v. Ellis*, 15 Ala. 296, which bears upon this branch of the case. He asks: "Why not *directly bequeath* to them the money which he merely *recommends his wife* to give?"

The question must have been written without his usual carefulness; for if it were sound, then there could be neither express nor implied trusts in a will. If it be said a trust is a direct gift, then the question is without force, for the point was whether a trust was created. It is apparent however, from the whole opinion that the question was not intended to have the force, which, standing alone, it might have; but that is one of those extreme arguments which will sometimes slip in to sustain a conclusion otherwise attained.

I think, then, that I may say: 1. That the words "it is my wish and will he shall give all my said property to Robert P. Means" are imperative, and that they import a trust, not only according to the weight of adjudicated cases, but also according to their "natural, ordinary, and familiar sense. 2. That the subject of the trust is certain. 3. That the object of it is certain. 4. That there is nothing in the will which shows a contrary intention, and therefore, that a trust is created by the will, unless it be void for remoteness. 5. Then comes the question: Is the trust void for remoteness? If the husband, having no issue, had made a will giving "all of said property" to his issue, and added, "but if I die without issue, then to Robert P. Means," he would have complied with the words of the testatrix's will, and the complainant would have been entitled to take; for that would have been a case which, according to precedent, makes an exception to the rule, that to "die without issue" means an indefinite failure of issue. But that exception cannot help the complainants, because, if the trust be void for remoteness, Caleb P. McCree was not bound to execute a conveyance, and therefore the principle of equity, which considers that as done which ought to have been done, cannot be invoked.

The rule is well established, that the words "die without issue" import at the common law, an indefinite failure of issue, and the trust in this case must, therefore, be held to be too remote, unless it be taken out of the rule by some exception or by the provision of some statute.

There are several exceptions to the rule. The first is the one already mentioned, where the limitation over is on the death of the donor "without issue," and he had no issue at the time of the limitation.

The second is where the failure of issue is combined with an event personal to the individual, as dying without issue and unmarried.

The third is where the subject of the gift necessarily precludes the idea that an indefinite failure of issue was contemplated, as if the subject be an estate *per autre vie*.

The fourth is where a restriction is raised from the nature of

the limitation over, as where all the limitations over in the event are for life.

The fifth is where words or phrases are furnished by the context which restrict the failure within the time prescribed, as issue living at death, or as in *Tanget v. Gaunt*, 1 P. W. 432. See *Keyes on Chattels*, § 181 *et seq.*

This case seems to fall within the second exception, and that exception applies to both real and personal property. 2 Jar. on Wills 429. The will imposed an exclusively personal duty by requiring the husband to make the gift to Means. *Kirby v. Fowler*, 6 Bro. Par. cas., 309. 2 Rep. Seq. 1555. *Fearne Rem.* 482, and *e consequentia* raises as strong an argument as a personal interest, and that is allowed to be restrictive, 2 Jar. on Wills 447. See also Doe'd. *Frost v. King*, 3 Barn. & Alder. 546, and other like cases which rest upon the ground that an event personal is restrictive.

Note the language used: "But should my said husband die without issue, it is my wish and will he shall give all of said property to Robert P. Means." She has coupled his death without issue with the gift she required him to make. *She has made his death without issue a condition precedent to the requirement that he shall give the property to the complainant.* She could not have intended that he should make the gift at some indefinite time after his death. The words which she used do not import a conveyance—that is to take effect at some future day: on the contrary, they import a gift in *presenti*. The meaning must, therefore, be, that he should, at his death, give the property to Robert P. Means, if at that time he was without issue, as she knew he must be, if he should not again be married. And this view of the words and phrases seems to bring the case within the fifth class of exceptions also.

The Code of this State provides, that "when a remainder is limited to take effect on the death of any person without heirs, or heir of his body, or without issue, the words "heirs" or "issue" must be construed to mean heirs or issue living at the death of the person named as ancestor, § 1302.

The English and Virginia statutes cover the case under consideration by express words; but our statute cannot reach it except by construction. The legislature undertook to remedy what was believed to be an evil, one kind of limitation alone is specified, and yet the evil is as great and is the same in regard to other kinds of limitation, as it is in regard to the one specified. Now the rule is, that a remedial statute must "be extended by construction to other cases within the same mischief and occasion of the act, though not expressly within the words." Co. Lit. 24 b; *Dwarris* 57. And this extension, by construction, of the

enacting words of a remedial statute beyond their natural import and effect, is said to be by no means unusual. *Dean & Chapter v. Middleborough*, 2 Y. & J. 196.

Thus, in *Winchester's case*, 3 Rep. 1, it was held that *remainders* were within the purview of 9 R. 2 C. 3, although it provides only, "if tenant for life, tenant in dower, tenant by curtesy, or tenant in tail, after possibility of issue extinct lose *in præcipe*, &c., that *he in reversion*, his heirs, or successors shall have an attain or a writ of error," &c.

But if the rule be too strongly stated in the authorities cited, no one will deny that a remedial statute ought to have a construction co-extensive with the evil, if the enacting words have a meaning so extended.

It is clear the word "remainder" was not used in the section as a technical word; for there is no such thing technically as a remainder in personal property. It has, however, in some of the books a *quasi* technical meaning, by which it includes limitations of personalty, which, like remainders, are to take effect upon the regular expiration of a partial interest. In popular language, it means a residue, and I think, includes any kind of a limitation over, though, to a legal mind, that is certainly a very strong definition.

If such be its popular meaning, then the construction, according to the rule, must reach the evil wherever it exists in any kind of limitation over, and the statute must, therefore, be held to govern this case.

There are, indeed, divers cases in which the most learned English Judges have held that such a disposition of property, as is contained in this will, created a life estate in the first taker and a *remainder* over in trust. Thus in *Wright v. Atkyns*, 17 Ves. 255, there was a devise of real and a bequest of leasehold estates to the devisor's widow and "her heirs forever, in the fullest confidence that after her decease, she will devise the property to my family," and it was held, by Sir William Grant, that the widow took an estate for life only, with remainder in trust, for the devisor's heir as *persona designata*, and the decision was afterwards affirmed by Lord Eldon, 19 Ves. 299. Upon appeal to the House of Lords, however, Lord Eldon said: "Upon reconsidering this case, I am perfectly satisfied that there is no ground to say that Mrs. Atkyns is only tenant for life," and he then held that she took the fee subject to a trust. 1 T. & Rus. 113. And so in *Wace v. Mallard*, 11 Eng. L. & Eq. R. 4, which has been already cited, where the gift was to the widow, her heirs, executors, administrators, or assigns to and for her sole use and benefit, in full confidence that she would appropriate and apply the same for the benefit of his children. *Parker, V. C.*,

held that the widow took but a life estate, with the power of appropriating the remainder.

It seems very clear, however, that Lord Eldon's opinion in the House of Lords is correct, that in cases like this, the first taker has a fee subject to a conditional limitation by way of trust. But it is also true, that in the event prescribed, the first taker's interest is terminated with his life, and the *residue* or *remainder* of the estate passes to the next limittee.

This fact and the last cases which I have cited are strongly persuasive of the construction which I have given to the statute.

My conclusion, then, upon the second question is, that the trust in favor of the complainant is not too remote at the Common Law, and if it were, that it is saved by the statute.

3. The question then is upon the account. The complainant was entitled unconditionally to five thousand dollars of the estate left by the testatrix, and in the event which has happened he has become entitled to the "balance" of her property. He is therefore entitled to the whole of the estate left by her at her death together with the accretions to the capital since that time, subject to such charges and deductions as may be shown ought to be made according to the rules of law. That is the general proposition; but it is necessary to lay down some more specific rules, especially as the administrators are liable partly as administrators, and partly as individuals. As administrators they are liable; first, for the interest upon such part of the five thousand dollars as had become due before the intestate's death, and was unpaid, from the day it was payable until the end of the year in which he died, subject to be discharged, as to so much as accrued after his death, in whole or in part, by showing profit after his death and outside of the emblements. The principle is that so long as McGee or his estate retained the property, or took the profits, his estate ought to pay interest. And his administrators are entitled to the crop of the year of his death, after deducting one year's supply for the plantation of the provisions which were made on it. The end of the year is not perhaps strictly correct, but it is better to have rule than to have a special inquiry in each case, as to the time when the crop was gathered. It may be before the end of the year, or it may not be until time to prepare for the next crop, with which of course it cannot interfere. The end of the year is the time when accounts in the country are generally cast, and the crop is the profit of that year. If it be not strictly correct, then I must do as Lord Eldon said in *Gibson v. Bott*, 7 Ves. 95, "I must cut the difficulty," and so follow his example in that case and in *Sitwell v. Bernard*, 6 Ves. 520.

Second, for the value of any part of the *corpus* of the estate

aliened by their intestate, with interest from his death, if the complainant shall elect so to charge them, instead of pursuing the property in the hands of the purchasers. This rule must be taken with qualification. If a mule or gin was sold or exchanged, the substitute cannot be taken, and the value of the one aliened also claimed. And further, if an exchange or sale was prudent under the circumstances, I think the complainant is bound by it. Not that the first taker had the power of alienation for his own benefit, but as a trustee had the right to exchange or sell for the benefit of the estate, and this power seems to result from his right to enjoy and manage the property as a prudent proprietor. But this second liability is not open to inquiry under this will.

Third, for deterioration of any part of the *corpus* of the estate which was for want of good husbandry, or ordinary care.

Fourth, for deficit of personal property received by their intestate under the will and *the accretions to the capital* thereof, as increase of slaves, which remained not at his death; unless some ground of discharge be shown, as that the chattel was lost or destroyed, notwithstanding the ordinary care of an absolute owner; or that it was a chattel consumed or worn out in the use, and not such a one as good husbandry required to be kept in repair, or replaced by another before his death.

It is true as a general rule that one who has a partial interest in flocks or herds, takes the increase as profits. But it is said that the rule is subject to the qualification that the original stock must be kept up out of the increase. It seems that the qualification ought to be greater in this country in regard to hogs when they are given in connection with a plantation and slaves, for good husbandry requires, if it may be done by it, that the number of stock hogs should be increased *pari passu* with the increased demand for the sustenance of the slaves. If such addition were made by good husbandry, it would become part of the *corpus*, and if not made, when it could and should, by good husbandry, have been done, there should be a charge for the deficit.

They are liable individually: First, for all the property with accretions to the capital thereof which was of her estate and which came to their hands after the death of their intestate; unless lost or destroyed before demand made by complainant, and in spite of ordinary care on their part. If charged with the value, they must be charged with interest from the loss or destruction.

I said "before demand," because the legal title having passed to them as administrators they had the right to hold the property, subject of course to the complainant's equity.

Second, for all the *corpus* and accretions lost aforesaid, which

was in their hands when demand was made by complainant, and which they shall not deliver, under the order which will be made, and this liability as in trover. What property was in their hands when demand was made is matter for present inquiry; what they shall not deliver will remain for future reference.

Third, for any deterioration of the estate which resulted from a want of ordinary care before demand by complainant; if after demand made, then for such deterioration, with or without care, as in case, unless they be charged in trover.

Fourth, for all profits received since the death of their intestate, except the emblements after deducting the year's supply as aforesaid, with interest from demand, if subsequent and from reception, if prior unless they discharge themselves as to the latter period, as in case of administrators and executors, or they may be charged with the profits to demand, and with rents and hires afterwards, with interest from the usual time in such cases at the election of the complainant. If the complainant shall charge the administrators with the profits received by them from the plantation, he cannot of course charge them with the year's supply which was consumed in making them.

When personal estate is given to one person for a limited period, with limitations over, the general rule is, that "unless the testator directs the mode so that the perishable part shall continue as it was, the court understands that it shall be put in such a state that the others may enjoy it after the decease of the first." *Howe v. Earl of Dartmouth*, 7 Ves. 137. Whether the first taker is to enjoy the property in specie is a question of intention, whether it be specific or residuary. *Pickering v. Pickering*, 2 Beav. 57. When the gift is specific, it is *prima facie* the intention that the property shall be enjoyed in specie, when it is residuary, it is *prima facie* the intention that it shall be converted. *Keyes on Chattels*, § 22. The gift to the husband in this case was residuary and *prima facie*, therefore the complainant is entitled to an account of the whole estate which came to the husband after the death of his wife, as well of chattels consumable in the use as of those not consumable. But I think the testatrix intended that her husband should enjoy the property in specie, and this seems to be quite certain when the will is "read by the light of surrounding circumstances." And this is not without authority. *Dunbar v. Woodcock*, 10 Leigh 628; *Evans v. Inglehart*, 6 Gill & John. 195. It would indeed be doing violence to the intention of the testatrix to say that she intended her husband should enjoy the property otherwise than "in accordance with the custom of the country."

The husband then was entitled to the use as owner of all the property left by his wife at her death, except the legacy to com-

plainant. But he was entitled to that use only "in accordance with the custom of the country." As to chattels which were consumable in the use, as wines, preserves, &c., and which did not pertain to the plantation, I think there can be no account; unless it be of such of them as were left specifically at his death. But the current of authority seems to be against the qualification, though it has a *dictum*. *Dorr v. Wainwright*, 10 Pick. 380, and "a sense of plain justice" in its favor.

Now the owner of a plantation, according to the custom of the country, takes the profit of it, and the profit is the nett income after keeping up the plantation out of the proceeds of it. The plantation with its furniture, its provisions, its stock, &c., constituted the *corpus* of her estate. The ears of corn, which were part of the supply of plantation provisions at his death, were not the identical ears which were part of the supply at the death of the testatrix, nor was the mule, nor the plough, which had been put in the place of the one that was worn out, the identical mule or plough; but still they were parts of the same *corpus*, as a man or a river is ever the same, though the particles of one and the other are ever changing.

Suppose the testatrix had said: "I give the income from my plantation to my husband for life, and then Robert P. Means shall take," would not that have been just what she has said? and would not the husband have been bound first to apply the proceeds to keeping up the plantation? and would not Means have been entitled according to the rules which I have laid down?

Take it to be the general rule that the gift for a limited period of a chattel consumable in its use is the gift of it absolutely, yet it is but a question of intention; and there may be a valid limitation over of such chattel where it is to be specifically enjoyed by the first taker whenever an intention appears to charge him with the value or like kind. This accords with and is nothing more than the principle of bailment. Thus, if A. lends to B. a bushel of corn, B. takes the absolute property in the corn, but he is bound to return a bushel of corn or pay its value. So if a sum of money be limited to A. for life, to be taken specifically by him with a limitation over, A. takes that particular money absolutely, and yet the limitation over is good; for as it has been said "more novel than the Phoenix, it not only renovates itself, but produces issue." If this be true, *a fortiori*, is it true also of corn, &c., when taken in connection with a plantation? This partly sustains the mode prescribed for the account, but it is not broad enough; and besides, it is not the true ground. My position, as I have already said, is that the husband took the *corpus*, in the event which has happened in trust for Means; the profits he took for himself. If he did take it in trust he was

bound to good husbandry. In corroboration of the position, it may be said, as it is presumed that it was the intention of the testatrix that her husband should take and enjoy the property "in accordance with the custom of the country," so it must be presumed that she intended the complainant, if he took at all, should take and enjoy it in the say way. It cannot be said that the testatrix intended that Means should take the plantation stripped of provisions and implements of husbandry, but on the contrary, it must be said that she intended he should take it furnished and ready for planting. But take a case: A plantation, slaves, provisions, plantation tools, &c., are conveyed to B. in trust, to receive the profits and pay them to C. for ten years, remainder to D. After the expiration of ten years, there is a contest between D. and the trustee, upon the questions, what was profit and what was *corpus*? The answer is plain, and it shows two propositions to be true: 1. That the gift of plantation, provisions, &c., is not inconsistent with a limitation over, though they are consumable by use, and to be specifically enjoyed; and 2. That they constitute a part of the *corpus* in such cases.

In support of the principal rules which I have prescribed for taking the account, I rely for authority upon one or another of these cases: *Flowers v. Franklin*, 5 Watts 265; *Robertson v. Collier*, 1 Hill Ch. R. 370; *Patterson v. Derlin*, 1 McMullan Eq. R. 462; *Florry & Trapier v. Glover*, 2 Hill Ch. R. 520; *Finley v. Hunter*, 3 Stroth. Eq. R. 84; *Madden v. Madden*, 2 Leigh 389, *dictum* Green, J.; but most especially I rely upon the well settled principles which govern an account between trustee and *cestui que trust*.

I know there are cases which seem to be in conflict with some of the principles of account which I have laid down, as *Hayle v. Burrodale*, 1 Eq. Ca. Abr. 361-88; *Poindexter v. Blackburn*, 1 Ir. Eq. 289; *Smith v. Barham*, 2 Dw. Eq. 426; *Lewis v. Davis*, 3 Mo. 133, &c.; but I think I have followed the intention of the testatrix and the main current of authorities. This case, however, is distinguishable from them; for here there is an express trust. But the principles ought to be the same where the limitation over is direct, for there is an implied trust. The case of *Harrison v. Foster*, 9 Ala. 955, seems also at first sight to be partly adverse, but the same distinction seems to exist. If, however, it be not so, and that case governs this, I reserve the matter of account it controls until the coming in of the Master's report.

The Master will credit the administrators as such, with whatever amount was paid to complainant on the legacy to him; but without anticipating further questions that may arise on the reference, I will add a general direction that he make all reasona-

ble charges and allowances on both sides. And this I do the more readily as the contest has been entirely upon "the outer wall," and I have been left to the account without argument or brief.

There are two other questions in the answer which go to the bill, but they were not relied on in the argument. I have looked into them, however, and they seem to be without force in this cause. The first is, that the complainant is a non-resident, and that he has not given security for costs. The testimony shows that he has been a resident of the State for several years. The other is that decree of the Probate Court concludes, and that is met as to the legacy of five thousand dollars by the statute allowing bills for the correction of mistakes of law or fact which were made without fault on the part of complainant, and as to the residue by the fact that it was an equity of which that court could not take cognizance.

Let the following decree be entered :

This cause came on to be heard at the last term on bill, answers, testimony, &c., and was reserved for decree in vacation, and now upon consideration thereof, it is adjudged that complainant is entitled to relief.

It is therefore ordered that it be referred to the Registrat as Master, to take and state accounts in accordance with the opinion, and that he report at the next term.

It is further ordered that the amount of the appeal bond to supersede this decree shall be ten thousand dollars.

WADE KEYES, *Chancellor.*

TAX TITLES. EJECTMENT. EVIDENCE.

Hugh McQuain v. James F. Meline.

In the District Court of the United States for the Western District of Virginia, at Clarksburg. Spring Term, 1858.

Under the provisions of the Code of Virginia, when a sale of land has been made by a sheriff for the non-payment of taxes, and a conveyance has been made by the clerk of the county court, and recorded, such title as was in the person assessed with the taxes, at the beginning of the year for which the assessment was made, is vested in the purchaser, notwithstanding any irregularity in the proceedings, unless it appear on the face thereof.

Though the party in whose name the land was assessed, after the assessment, and before the sale, died, and under a decree against his heirs, the

land was sold before the conveyance was made by the clerk in pursuance of the sale for the non-payment of taxes, the sale for the taxes will prevail against the sale under the decree.

The purchaser at the sale, for the non-payment of taxes, need not show the proceedings previous to the deed from the clerk to him, in order to recover on such title. The deed itself, when regular, is *prima facie* evidence that the proceedings were regular, and that the title passed.

The assessment of the land on the commissioner's book with the taxes for the non-payment of which, it is sold, is not a circumstance in relation to the sale, which is required to be recited in the deed from the clerk to the purchaser.

If the assessment be such a circumstance, a recital that the land was returned delinquent for the non-payment of the taxes, necessarily implies such previous assessment, and is sufficient.

The case is fully stated in the opinion of the Judge.

John S. Hoffman and Benjamin Wilson for the plaintiff.

William A. Harrison and Charles T. Harrison for the defendant.

BROCKENBROUGH, J.

This is an action of ejectment, originally brought in the circuit court of Gilmer, by *Hugh McQuain v. George Spurgeon*, the tenant in possession, to recover a tract of 130 acres of land, situated in the county of Gilmer, on the Bear Fork of Cove Creek. James F. Meline, the lessor of the original defendant, and a citizen of the State of Ohio, appeared, and was made defendant in the place of his lessee, in pursuance of the provision of the Code of Virginia, p. 558, § 5. At the time of his appearance, the new defendant pleaded the general issue, and presented a petition to the State court, alleging that he was a citizen of the State of Ohio, and praying on that ground, a removal of the cause to this court, in virtue of the act of Congress in such case made and provided. The requirements of the act of Congress having been complied with, the cause was regularly transferred to the docket of this court.

The cause comes on now to be heard on a case agreed between the counsel for the parties respectively, the important facts of which will here be stated.

On the 30th of November 1838, a patent was issued from the Land Office of Virginia, granting the land in controversy, described as containing 130 acres, situate in Lewis county, on Big Cove Creek, and setting out the metes and bounds thereof, to one Cummins E. Jackson, in absolute fee simple. At a subsequent period, the Legislature of Virginia created the county of Gilmer, embracing that portion of the county of Lewis in which

the land in controversy is situate. The identity of the land granted to Jackson with that in controversy between the parties here, is a fact found by the special case agreed between them.

The plaintiff claims under a tax title deed, made to him on the 20th day of August 1853, by C. B. Conrad, clerk of the county court of Gilmer, conveying the land in controversy to the plaintiff, as purchaser thereof, at a sale made by the sheriff of Gilmer, of said land, as delinquent for the non-payment of taxes due by C. E. Jackson, to the Commonwealth. The conveyance was made by the clerk in virtue of the 16th section of chapter 37, p. 203, of the Code of Virginia. The fact of the due election and qualification of the grantor as Clerk of Gilmer, is established by the case agreed. The material recitals in the deed are that it appeared from papers in the clerk's office of Gilmer county, that the land in controversy, together with four other tracts conveyed by the same deeds, was included in a list of delinquent lands delivered by the auditor of public accounts, to the sheriff of Gilmer, to be sold by him, in the year 1850: that it was reported as being delinquent for the non-payment of taxes due thereon for the years 1845, 6, 7, 8 and 9: that the said list was copied three times, and that one copy was posted at the front door of the court-house, with a notice subjoined that the real estate therein mentioned, would be sold at September court, 1850, of Gilmer, as appeared by a copy filed in the said clerk's office: that it also appeared by a list of the lands reported as having been sold by said sheriff, in the months of September and October of the last mentioned years, and filed in the clerk's office: that the land in controversy, described as number 5, at the September term of the court, 1850, and on the 23d day of that month, was sold for the amount of tax due thereon, being 76 cents, and that the plaintiff became the purchaser thereof for that sum: that the tract in controversy was returned delinquent in the name of Cummins E. Jackson, and that the purchase money, fees and commission, were paid by the plaintiff to the deputy sheriff who made the sale, as appeared by his receipts in the hands of the plaintiff: that two years had elapsed since the sale, and the land had not been redeemed: that the whole tract was sold: that the plaintiff after the expiration of the two years obtained from the surveyor of Gilmer a report of the tract so sold, which was presented to the county court of Gilmer, at its August term, 1853, and no objection appearing to it, the court ordered it to be recorded, which was accordingly done. The land was conveyed by metes and bounds, conforming to those set out and described in the original patent from the Commonwealth to Cummins E. Jackson, of November 1838, before referred to. The deed was acknowledged by the grantor before a justice of

the peace for Gilmer, and admitted to record on the day of its date.

The defendant claims title to the land in controversy in virtue of a judicial sale made under a decree of the circuit court of Lewis county. On the 21st of June 1848, certain creditors of C. E. Jackson, filed their bill in chancery in the circuit court of Lewis county against him and others, seeking to subject his real estate to sale for the payments of his debts, he being then a non-resident of the State of Virginia. Pending the said cause C. E. Jackson died intestate, and the cause was revived against his heirs at law. On the 26th of March 1853, the court pronounced a decree directing the real estate which had descended to the heirs at law of the debtor, to be sold by certain commissioners named in the decree. The real estate, embracing the land in controversy here, was sold by the commissioners on the 20th of August 1853, and Joseph H. Dis Debar became the purchaser of the last mentioned tract at the price of \$400 50, which sale was confirmed by the court by a decree rendered on the 27th of August 1853; and by another decree rendered on the 6th of September 1854, the commissioners were ordered to execute a deed conveying said land to Debar when he should pay the purchase money. Cummins E. Jackson died in California in December 1849. It is ascertained by the special case that the land in controversy was worth \$400 at the time of the sale made by the sheriff of Gilmer, for the taxes. The purchaser at the judicial sale sold, or contracted to sell, the said land, and made a deed of conveyance thereof, to the defendant Meline, and the original defendant Spurgeon took possession of the land as tenant of the present defendant, Meline.

The general question of vital interest resulting from the facts thus agreed is, was the deed of the 26th of August 1853, from the clerk of Gilmer, effectual to convey the legal title to the land in question, previously vested in C. E. Jackson by the Commonwealth's patent of November 1838, to the plaintiff here or not? If that deed was valid and effectual for that purpose, then although its execution was subsequent in point of time to the rendition of the decree of the circuit court of Lewis, directing a sale of said land to satisfy the claims of the creditors of the patentee Jackson, yet it operated by relation to vest in the grantee such estate as was vested in the party assessed with the taxes, on account whereof the sale was made at the commencement of the year for which the said taxes were assessed, notwithstanding any irregularity in the proceedings under which the said grantee claims title, *unless such irregularity appear on the face of the proceedings*.—Code of Virginia, p. 240, § 22. If, on the other hand, there be any irregularity apparent upon the face of

the proceedings, such as the act contemplates, such irregularity vitiated the deed, and made it a simple nullity. Accordingly the whole stress of the able and elaborate argument of the counsel on each side has been directed to this point, the counsel for the plaintiff maintaining the validity of the deed, and the counsel for the defendant insisting with great earnestness that it was inoperative and void.

It is much to be regretted that sitting as a Federal court, I am called to break the way in the exposition of a most important statute of the State, not heretofore expounded by her own judicial tribunals; and my embarrassment is increased by the consideration that if I err in its interpretation, the error is one which cannot be reversed by writ of error from the Supreme Court of the United States, the amount in controversy not being sufficient to give jurisdiction to that tribunal. In construing the various sections of this statute which are pertinent to the question presented for solution, I am to place myself in the position of a State court called to expound them, and apply the same construction which that court would apply, as far as that can be ascertained by the light of reason and the analogies of the law; for it is a most wise and salutary provision of the Judiciary act of 1789 that the laws of the several States shall be rules of decision for the Federal courts exercising jurisdiction within the territorial limits of such States respectively. Had these sections of the act of 1850 been expounded by the highest judicial tribunal of the State, that exposition would furnish an authoritative rule for the guidance of the judgment of this court, for it is well settled that the decision of the highest appellate court of a State, involving the construction of the statute law of the State, is the highest evidence of that law, that the Federal courts of every degree, including the Supreme Court of the United States, as well as all subordinate tribunals, are absolutely bound by such decision. But although the recent law in relation to the sale of lands delinquent for the non-payment of taxes due to the State, has not yet been expounded by her own courts, the provisions of former laws on the same subject and very similar to the law now to be interpreted, have been fully expounded by the Court of Appeals in several recent cases, and I have derived great aid in reaching a conclusion satisfactory to myself, from the light furnished by the luminous opinions of that court in the cases of *Flanagan v. Grimmitt*, 10 Grat. 421, and *Hobbs v. Shumates*, 11 Grat. 516.

It is insisted by the counsel for the defendant, that there is an irregularity on the face of the proceedings sufficient to vitiate the deed, under which the plaintiff claims. It is said that there is no recital or averment in the deed that the land in question

had ever been assessed at all. It is certainly true that there is no such averment in express terms. The statute requires that the deed of the clerk conveying land sold for the non-payment of taxes to the purchaser, shall set forth *all the circumstances appearing in the clerk's office in relation to the sale*. Another statute requires that the assessors of the lands of the Commonwealth deposit in the clerk's office of their respective courts lists, showing the assessed value of all the lands in the county, and the law presumes, in the absence of direct proof, that the public duty thus enjoined has been properly and rightfully performed. There was, then, in the clerk's office of Gilmer county, on the 20th day of August 1853, record evidence that the land conveyed by the clerk to the plaintiff had been regularly assessed, and the amount of tax with which it had been charged. Was the fact of such assessment, one of the circumstances appearing in the clerk's office in relation to the sale, the failure to set forth which vitiated the deed. If it was necessary to set it forth in the deed, has not this been substantially done in averring that the land in controversy was *delinquent* for the non-payment of taxes due thereon, and the amount of those taxes? I shall briefly address myself to each of these questions in the order stated.

Does the omission to aver in express terms, in the deed, that the land sold as delinquent for the non-payment of taxes was duly assessed, vitiate the deed? There can be no question that the assessment of the land, as a matter of fact, lies in the foundation of the plaintiff's title, for if there was no assessment, no taxes were due, and if no taxes were due, there could be no delinquency for their non-payment. A sale, therefore, and conveyance of land for non-payment of taxes without a previous assessment would be a simple nullity. But though there must necessarily be an assessment in all such cases, is it one of those circumstances appearing in the clerk's office *in relation to the sale*, which it is indispensable to aver in the deed to give it validity? The case of *Flanagan v. Grinnett* is a strong authority in support of the negative of the question. This case required the court to construe the act of the 9th of February 1814, respecting the sale of lands delinquent for the non-payment of taxes. The act was passed to remedy evils growing out of past legislation, and the construction put upon the former laws on the same subject by the court of Appeals. Very stringent rules had been previously applied by the court against the purchaser of a tax title. "When the act of February, 1814," says the court, "was enacted, the legislature was fully aware of the construction which had uniformly been put on laws of this description. Few principles of law are more firmly established, and

from their influence on the transactions of others, more widely known than that where the validity of a deed depends upon an act *in pais*, the party claiming under it is bound to prove the performance of the act: that in the case of a naked power not coupled with an interest, the law requires that every prerequisite to the exercise of such power should precede it: that the claimant under a sale made to enforce a forfeiture must show that the law has been strictly complied with: that the recitals in a deed of an officer selling for taxes were not even *prima facie* evidence of the regularity of his proceedings, and that these facts must be proved by evidence *aliunde*." The court held that these rules were essentially modified by the act of 1814. That act required the sheriff to advertise a sale of delinquent lands at the May, June and July terms of the court of his county, and to publish the advertisement at least once every week for two months preceding the time of sale, in some newspaper published in the city of Richmond. It also directed him to execute a deed to the purchaser at such sale, *reciting the circumstances thereof*, and setting forth particularly and truly the amount of the purchase money; and that after the time of redemption allowed had elapsed, the regularity of the proceedings under which the purchaser at the sale claims title shall not be questioned, unless such irregularity appears on the face of the proceedings. In the construction of this act it was held that by the circumstances of the sale, which are recited in the deed, was not meant, all the steps to be taken by the various officers which preceded the sale, but the *circumstances attending the sale itself*, viz: that the sale was made at the time and place prescribed for the sale of lands returned delinquent: if less than the whole lot or tract was sold, how much was sold; who was the purchaser, and the amount of the purchase money; and that it was not necessary that the deed should recite that the land had been advertised; that even if an insufficient advertisement was recited, it would not be an irregularity on the face of the proceedings which would avoid the deed; but any recital of that fact being unnecessary, the recital of an insufficient advertisement was mere surplusage, not affecting the validity of the deed. The deed to the purchaser was held to be valid, though there was no express recital of the fact that the land had been assessed. The attention of the court does not seem to have been called to this omission, but it is not to be presumed that an omission fatal to the pretensions of the purchaser's claim would have escaped the vigilance of both bench and bar, in a case so laborately discussed by each. The only reasonable deduction to be drawn from the case, touching the point under consideration, is, that the recital, in express terms, of the fact of assessment was not one of the circumstances of the sale, required to

be recited in the deed to the purchaser. Has the law of 1850, made any change in this respect? The language of the two acts are very similar, but not identical. By the act of 1814, the sheriff who conducted the sale was required to execute the deed to the purchaser: by that of 1850, the clerk of the county is required to make it: by the former, it was contemplated that the sheriff should make the deed before the expiration of the two years allowed for the redemption of the land: by the latter the clerk is required to make the conveyance after the expiration of that time: by the former, it is required that the deed *recite the circumstances of the sale, and set forth particularly and truly the amount of the purchase money*: by the latter, that the clerk's deed *set forth all the circumstances appearing in the clerk's office in relation to the sale*. The former act seems to have required a more minute recital than the latter, and this discrimination was not an arbitrary one. The sheriff was required by the former act to recite in his deed all the circumstances attending the sale; which seems to have been reasonable as he was personally cognizant of those circumstances; but by the latter, the clerk is only required to recite those circumstances, *in relation to the sale*, appearing in the clerk's office. We have seen from the case of *Flanagan v. Grimmitt*, that the recital of the fact of assessment was not one of the circumstances of the sale required to be expressly recited in the sheriff's deed; and if not, I can conceive of no reason why it should be so deemed under the act of 1850, which was designed to restrict rather than enlarge those recitals. The assessment, though the remote foundation of the purchaser's title, under either, cannot be affirmed to be a circumstance having immediate reference to the sale. It is an indispensable element of title in either case, but not a circumstance in relation to the sale itself, within the meaning of the act. But even if it were so, I apprehend that the fact that the land was regularly and duly assessed is substantially averred in the deed in this case. The recital that the land was delinquent for the non-payment of the taxes due upon it, not by reasonable intendments only, but by necessary implication, involves the averment that the land was assessed. The assessment of land by the proper officers of the government is the only mode known to the law, by which the amount of tax chargeable on the lands, is fixed and determined. Until the assessment, the amount of tax due upon the lands is altogether indeterminate and uncertain, and no demand or levy for the tax, can lawfully be made, until the quantum of tax has been fixed and ascertained, in the mode prescribed by law. Lands may be assessed without a subsequent delinquency, because this may be prevented by the payment of the taxes, but the converse of the

proposition is not true. There can be no delinquency without a previous assessment, and when it is affirmed, therefore, that lands become delinquent for the non-payment of taxes, it is affirmed, by necessary implication, that the lands had been previously assessed. The silence of the Court of Appeals in the two cases of *Flanagan v. Grinnett* and *Hobbs v. Shumates*, above cited, as to the omission to recite expressly that the lands had been assessed, coupled with the decision in each case, that the deeds to the purchaser were valid to vest a good *prima facie* title in him, and such title, as at the time the land was returned delinquent was vested in the person on whose name it was so returned, seems pregnant with the admission, that the recital of delinquency necessarily presupposes a previous assessment.

During my investigation of this case, I have felt a strong desire to sustain the title of the defendant, who appears to have acted in good faith, and to have paid full value for the land, rather than that of the plaintiff who purchased it for a song. But it is the business of courts to declare and not to make the law, and as the plaintiff seems to have acquired his title, in accordance with the prescribed formalities of the law under which he acted; and as the Court of Appeals in the two leading cases cited, have sustained the title of the purchasers, in cases in which the recitals were much less special than in the case at bar, and in virtue of a statute not at all different in principle from that which is to govern the present case. I am constrained to say that judgment must be rendered for the plaintiff.

PARTNERSHIP LIABILITY.—LIMITED PARTNERSHIP.

Kyle v. Early and others.

Circuit Court of Wythe County, Va. October Term, 1858.

One member of a firm cannot admit another person as a partner; but the person so admitted cannot complain of the irregularity of his admission. Though persons may not be partners *inter se*, yet they may be held to be partners as to third parties; there being a distinction as to the circumstances necessary to constitute the relationship of partners, in the two cases.

One who is a partner to any extent is so to the full extent of the liabilities of the firm, in the absence of a compliance with the requisitions of the law concerning limited partnerships.

The court will not enjoin an execution against partners, to enable them to settle their responsibilities among themselves, but will hold all liable for the whole debt, leaving them to settle with each other.

It is not a sufficient ground for an injunction, that the party was not served with process in the suit in which the judgment or decree, sought to be enjoined, was rendered, if the original demand was just, and no substantial injury has been done to the complainant.

QUÆRE: Whether one partner has not a right to enter an appearance for the whole firm, and whether a judgment or decree, rendered upon such appearance, ought to be enjoined at the instance of another member who was not served with process.

This was an injunction, granted by the *Hon. S. V. Fulkerson*, and filed in the Circuit Court of Carroll County, setting out the following case :

That, in the year 1854, *Harrold S. Mathews*, the *Hon. Andrew S. Fulton*, and eight other persons entered into a joint lease of a tract of mineral land in Carroll County, upon which a copper mine had been discovered, and formed themselves into a partnership under the style of "*The Dalton Copper Mining Company*," for the purpose of exploring and working said mine, each member being entitled to one tenth of the profits, and liable for one tenth of the losses of the undertaking ; *That*, soon afterwards the complainant, *James Kyle, Jr.*, bought from *Mathews* one fifth of his interest in said company, by a written agreement, which provided that they should share in the profits and bear the losses of their undertaking in proportion to their shares and interest : *That*, another firm was established about the same time, which was composed of several members of the *Dalton Mining Company*, and eight other persons (of whom *John Early* was one) not belonging to that Company, which firm was called "*Pierce, Rice & Co.*," and was intended to carry on mercantile operations, and was located in the mining district, near the Dalton mine : *That* the *Dalton Mining Company* contracted a heavy debt to *Pierce, Rice & Co.* ; that in the year 1856 *Pierce, Rice & Co.* filed their bill in the Circuit Court of Carroll County against the *Dalton Mining Company*, to have a settlement of accounts and payment of the amount due to *Pierce, Rice & Co.* ; that the defendant, *Fulton*, who was a member of both firms, being Judge of the said Circuit Court, the cause was sent to the County Court of Carroll to be therein proceeded with ; that a settlement of accounts was made, upon which the *Dalton Copper Mining Company* was found indebted to *Pierce, Rice & Co.* in the sum of upwards of \$10,000 : that the County Court made a decree in favor of *Pierce, Rice & Co.* for the amount so found due ; but that said Court, instead of

awarding execution against all of the *Dalton Mining Company*, for the whole amount, appointed the said *John Early* a receiver, and directed that *each member or set of members*, of that company, (the number having been largely increased by sales and sub-divisions,) should pay to *Early* one tenth of the amount due to *Pierce, Rice & Co.*, and that upon failure so to do, *Early* might sue out executions against the member or members so failing; that, among other provisions of said decree it was ordered that "the defendants, *H. S. Mathews* and *James Kyle, Jr.*, do jointly pay one tenth part of the said sum, to the said receiver, and upon their failure so to do that he issue execution for the same, &c.;" that no process to answer the said bill was ever served upon complainant; that at the time said bill was filed, account taken, and decree pronounced, complainant was, and still is, an inhabitant of North Carolina, residing at Fayetteville, yet no order of publication was ever made against him: that he was utterly ignorant of the suit and decree until in the summer of 1858, visiting the mineral springs of South-western Virginia, the sheriff of Wythe County levied upon his servant, horses and carriage, to satisfy an execution issued by *Early*, receiver, as aforesaid, against *Mathews* and complainant, founded upon the said decree, for an amount upwards of \$1100—including interest and costs; that *Mathews* is totally insolvent, and complainant will have to pay the whole debt and lose the amount, unless he can obtain relief: that at the time the firm of *Pierce, Rice & Co.* was established complainant was not a member of the *Dalton Copper Mining Company*: that he was never registered on the books of that Company, and his name never appeared as a member: that he had no voice in its management, nor had he ever voted in the election of its managers; that the members of the firm of *Pierce, Rice & Co.*, (a majority of whom belonged to the *Dalton Company*,) knew that he was not a member of the *Dalton Mining Company*: that the *Dalton Company* did not obtain credit on the faith of his membership, and that they had not been credited by *Pierce, Rice & Co.* on the faith of his responsibility: that although he had never been served with process in the said suit, and no order of publication had been made against him, and he was utterly ignorant of the existence of the suit, yet an appearance had been fraudulently entered for him without his knowledge, and the decree recited that "the defendant, *James Kyle, Jr.*, appeared here in court, and declining to answer, the bill is taken for confessed as to him," which recital was wholly false: that the amount which he had agreed to pay to his co-partner *Mathews* was yet unpaid, and complainant was willing to pay it to such person as the Court might direct: that although complainant was assured that said

decree was erroneous, he could not appeal therefrom in time to prevent a sale of his property; and making the sheriff of Wythe, *Early*, the receiver, and all the other members of *Pierce, Rice & Co.*, of whom said *Mathews* was one, defendants to his bill, he prayed that the sheriff might be restrained from selling his property: that *Early* might be prohibited from enforcing the said decree, and that the same might be enjoined until he could obtain an appeal therefrom.

Early and the seven other defendants, who were members of the firm of *Pierce, Rice & Co.*, but not members of the *Dalton Copper Mining Company*, at once answered the bill, stating as follows: that when the firm of *Pierce, Rice & Co.* was formed it was well known to them, and a notorious fact, that complainant was a member of the *Dalton Company*; that they were informed and believed that he was such a member, and had divided his interest in that Company by purchase from and agreement with *H. S. Mathews*, though they did not know the exact extent or quantum of his interest, that they had been informed by several members of the *Dalton Company*, and had learned the fact from other sources, that *Mathews* had given complainant a written transfer of part of his interest, and directed him to hand it to the book-keeper and secretary of the *Dalton Company*, that he might be recorded as a member, though they believed that he had, for reasons best known to himself, declined so to do: that it was, in part, on the faith of his membership, that they had allowed the *Dalton Company* to contract their large debt to *Pierce, Rice & Co.*: that they did not know, nor was it alleged in the bill that they knew, who had entered an appearance for complainant in the County Court, nor was it in any wise by their procurement: that they only saw and were only required to see that an appearance was entered for him, and they presumed it was done by some of his co-defendants, in order that he might be subjected to his due portion of the debt: that no injustice was done him by the decree, for the debt was fair and just—the complainant not even alleging that it was unjust in a single cent, or that he could have made any valid defence, even if he had been regularly summoned: that complainant admitted himself to be the partner of *Mathews*, and such being the case he was responsible for the whole debt: that they had only adopted the ordinary means for recovering a just demand, to which complainant was liable at all events; and that they had adopted no unfair or inequitable means in obtaining satisfaction of that demand: that whether complainant ought to be bound as between himself and the other members of the *Dalton Company*, was a question between him and them, with which respondents, creditors of that Company, had no concern: and that

they protested against being drawn into a litigation between him and his partners as to their respective liabilities.

Judge *Fulton* being a party to the cause, it was ordered to be removed into the Circuit Court of Wythe, which was to be held by Judge *Fulkerson*: and it now came on upon the motion of those defendants who had answered, to dissolve the injunction: the other defendants, members of the *Dalton Company*, not having answered. The motion was heard upon the bill and answer, no evidence having been taken; but the partnership agreement of the *Dalton Mining Company* was put in, though not made a part of the record, and was referred to by counsel. Among other stipulations it contained one to this effect: "No member is to sell his interest or any part thereof without the consent of his co-partners, or without giving them the preference or refusal of purchasing;" and also a provision that each member's share should be liable to all the others for his part of the debts of the partnership.

Cook, in support of the motion, submitted—

1st. That whatever was the condition of the plaintiff in relation to the *Dalton Company*, he was liable to *Pierce, Rice & Co.* for the full amount of their debt. A person may be responsible to creditors when the relation of partners does not exist between him and those who are jointly chargeable with him. A partnership *inter se*, and a partnership *quo ad*, third parties are very different things. See Collyer on Partnership, page 5, and also page 71 to 88 inclusive. *Waugh v. Curver*, 1st Smith's Leading Cases, 717, top paging, and the notes, English and American, to that case.

2nd. There can be with us no *special* or *limited* partnership without a compliance with the provisions of chapter 145 of the Code. The plaintiff admits that he entered into partnership with *Mathews*, therefore, as to us, he was in partnership with all, to any extent, for *Mathews* was a full partner, and could bind the plaintiff "as entirely as himself." See Collyer, page 363, and in notes.

3rd. The debt being confessedly just, no injury has been done to complainant by holding him responsible for a part thereof, which is all that has yet been done. A court of equity looks to real justice, not to formal regularity. It is like an application for a new trial, where the court will not interfere if justice has been done on the merits, though there may have been a formal irregularity. See *Goode v. Love*, 4 Leigh, 635.

4th. The court cannot grant an injunction to enable the party to take an appeal, especially for errors in the proceedings. So far from doing that, it would require a *release of errors* in the proceedings as a condition precedent to any relief on the merits.

Such is the rule as to all legal proceedings, and it certainly will apply yet more strongly to a suit in equity.

Kent, for the plaintiff, continued—

1st. That service of process on part of the members of a firm could not authorize a judgment or decree against those not summoned, or regularly proceeded against by way of publication; and he referred to the cases of *Barnett, &c. v. Watson, &c.*, 1 Wash. 372, and *Shields v. Oney*, 5 Munf. 550.

2nd. That the entry of an appearance for the plaintiff without his direction, did not bind him.

3rd. That the plaintiff was a partner only to a limited extent, if one at all, and could not be held liable beyond his express undertaking; and he cited Collyer on Partnership, pages 6 and 7; Story on Partnership, § 6.

4th. That one partner cannot admit any person into the firm without the consent of his co-partners: Collyer, pages 187-188. *Mathews* could not make the plaintiff a member without the consent of the others; and in this case the partnership articles contain stipulations prohibiting this very thing. See also Story on Partnership, § 5.

Cook, in reply to the last point, contended that the plaintiff was *stopped* to deny the regularity of his admission into the *Dalton Company*. His associates in that firm might have made such an objection, but it does not lie in his mouth.

FULKERSON, J.

The prayer of this bill is an anomalous one. I do not clearly see how the court can give the relief asked for. I can understand that it is the duty of a court of equity to afford redress when an unconscientious advantage has been obtained over a party by proceedings either at law or in equity, which result in substantial injury or injustice to him. But I do not see how this court can suspend an execution, regularly issued by another tribunal of competent jurisdiction, to enable the party to prosecute an appeal founded on supposed, or real irregularities in the proceedings, not involving any injustice upon the merits. This case assimilates itself to a motion or bill for a new trial, and we all know that, upon such an application, the court will not set aside the verdict or disturb the judgment for matters of mere form, if upon the whole case substantial justice has been done.

I am by no means clear that one partner cannot enter an appearance for the whole firm, which will render obligatory any judgment or decree that may be rendered against them. I will not say that such a thing may legally be done: neither will I say that it would be illegal. I do not remember any case in

which the question has arisen; but looking to the general principles which regulate the relations of partners, I see nothing which negatives the existence of such a power. The single partner may do anything within the scope of the joint operations: contract debts, release claims, buy and sell property, and do many other acts: why may he not, when the firm is sued, enter an appearance for all, so as to bind all? With the lights now before me I should hold such an act binding on the firm and all its members—at least when it appears to have been done in good faith, and to have wrought no prejudice to the real rights of any party concerned.

But without deciding in express terms any such proposition, let us see if any injury has redounded to this plaintiff from the decree and execution of which he complains. His case can only rest upon the proposition that he has been held liable for a demand for which he is not, in law and equity, responsible, and against which he could have made a successful defence if he had been allowed a day in court. To maintain this proposition he must show that he was not a member of the debtor partnership, so far as its liabilities to third persons are concerned. The liabilities of a person, alleged to be a partner, towards third persons and towards his co-partners themselves, are widely different. A liability often exists in the one case and not in the other. The courts often hold a party responsible as a partner to third persons, when no such relationship in fact exists. Often, indeed, he is so held liable, contrary to his intention, against his consent, and in direct opposition to his contract. The books are full of such cases—many of which may be found in the authorities cited in the argument at bar. Do those authorities apply to the facts of this case, as they appear from the bill and answer? I think they do. The plaintiff alleges in his bill that he bought an interest in this Company, that he was to share in its profits and losses, to a small extent, it is true, but that is immaterial. Now the community of profit and loss is the admitted criterion of a partnership, even as between the partners themselves; and a community of profits alone will make the participant a partner as to third persons. It may be possible, and doubtless is true, that the plaintiff did not intend to assume the obligations of a partner; but the law, as well as equity and justice, disregard his intention, when he does the acts which amount to an assumption of that character. He undoubtedly intended to make himself a partner so far as the share or interest of *Mathews* was concerned, for he says that: and I think that makes him a partner to all interests and purposes.

It is true that the plaintiff says that the contract between him and *Mathews* was a special one: that he intended to be-

come, and did by his contract become, a partner to the extent of only one fifth of the interest of *Mathews* in this concern. But our law recognizes a special and limited partnership only under certain circumstances. We have a statute declaring in express terms how a special partnership may be constituted; and it is not pretended that the requirements of that law were thought of, much less complied with in this case. In the absence of such a compliance every partnership is *general* with us; and each partner becomes liable for the obligations of the concern to the full extent of his estate. Putting the case on the best ground for the plaintiff, he admits himself to be implicated with *Mathews*. Now *Mathews* is not only bound to the creditors for the full amount of their claims, but he is liable to his co-partners for contribution of his full share of all that they are responsible for; and the plaintiff must share his fate. I think the facts here make him a partner, even in relation to the other members of the *Dalton Company*, and of course in relation to third persons and creditors.

A question has been made as to the right of *Mathews* to admit the plaintiff into the firm; and the articles of agreement between the original members of the *Dalton Company* have been referred to as shewing that *Mathews* had no such right, without the consent of the other members. No question of this sort is made in the bill and answer, nor are the articles of agreement made a part of the case. But even if they were, and the question was formally raised by the pleadings, it would avail the plaintiff nothing. It is an unquestionable truth that one member of a firm cannot admit a new member, by his own act: he must have the concurrence of the other members: but who is to make the objection? Surely not the person who has been taken in by one member. Such an objection cannot come from him. He is *estopped* to deny the regularity of his own admission. If this adventure had proved profitable, and the plaintiff were applying to the other members of the *Dalton Company* for his share of the profits, they might raise a question as to his regular standing in their body; but I cannot listen to such a question on his part.

It is possible that the decree of the County Court may not be proper in so far as it casts upon the plaintiff the whole burthen of the share of his insolvent partner, *Mathews*, instead of leaving the other partners to bear their parts thereof; but that is an error, if it be one to be corrected by an appeal from that decree. I am not sitting as an appellate court to correct errors in an inferior tribunal; and there may be circumstances which rendered this course proper. But if not, the true remedy is by

an appeal: for the whole matter appears on the record. An injunction is not the proper course to remedy that error.

On the whole I think that no injustice has been done to the plaintiff: that he is in fact bound for much more than was decreed against him; that he does not show any injustice arising from his absence from the court: that the debt is not denied to be just: that he could not have made, and does not even allege that he could have made, any defence to the claim if he had been present: that the defendants, *Pierce, Rice & Co.*, were guilty of no misconduct in the premises: that they have a right to demand their debt in full from the plaintiff: that if he has any claim to be exempt from any portion thereof, he must look to his co-partners for contribution: and that upon the whole matter I must *dissolve the injunction*.

Ordered accordingly.

BONDS. RIGHTS AND LIABILITIES OF ASSIGNEE.

Bailey v. Hutsell and others.

Circuit Court of Wythe County, Va. October Term—1853.

The assignee of a bond stands in no better situation than his assignor, and is subject to the same equities, *as a general rule*.

If the obligor in a bond induce a third person to purchase that bond, he shall not be allowed to set up any equities against it in the hands of that third person.

If the obligor was ignorant of the equity at the time he induced the assignee to purchase the bond, but could have known of that equity by the use of due diligence, he cannot set up that equity, but must bear the loss.

An obligor induces an assignee to purchase a bond, and afterwards discovers an equity which would be available against the obligee, but is not as against the assignee, and the obligor is entitled to a decree over against the obligee for all that he must pay to the assignee: in such case the assignee cannot recover the full amount of the bond, but only so much as he paid for it; that being all which he could recover against his assignor.

Bailey obtained an injunction from the judge of the circuit court of Carroll county; and the bills, answers, exhibits and depositions, made out the following case:

On the 1st day of September 1856, *Bailey* bought from defendant *Hutsell*, two parcels of land in Carroll county—one of 200 acres, which was to be conveyed to *Bailey* in trust for his wife and children, and which was paid for out of his wife's es-

tate: the other of 100 acres, adjoining the first, and which was for *Bailey's* own use. The price of each parcel was \$10 per acre. *Hutsell* gave *Bailey* two title bonds—one for each tract, binding himself to convey the lands by deeds with general warranty. The price of the 200 acre lot was paid; and for the residue *Bailey* gave three bonds, each for \$333 33 $\frac{1}{3}$. In October *Hutsell* assigned the bond first due to the defendant *Crawford*; and on the 13th January 1857, he assigned the other two bonds to defendant *Tate*. Some time afterwards the lands were surveyed, and it was found that *Hutsell* could not make title to a part of the 100 acre tract. He conveyed to *Bailey* 225 acres, and on the title bond for the 100 tract, *Bailey* made an endorsement that he had “received twenty-five acres of the within land.” But he averred in truth *Hutsell* only had title to a little over *eighteen* acres of the 100 tract. *Crawford* sued *Bailey* on the first note, and recovered judgment in March 1858; but *Tate* notified *Bailey* to pay the amount of the 18 acres to him, claiming it under a transfer from *Hutsell*. *Bailey* then obtained an injunction praying that *Crawford* might be restrained from enforcing his judgment; that *Tate* might be enjoined from instituting any suit on the two other bonds, and might be decreed to deliver them up to be cancelled: that *Bailey* might be directed to pay \$183, (the price of eighteen acres and a fraction,) to the proper person, and for general relief. He alleged *Hutsell* to be insolvent. The injunction was granted as prayed for.

Crawford's answer admitted none of the allegations of the bill, but insisted on proof. *Tate*, by his answer, disclaimed any knowledge of the facts, as set out in the bill; but waived their consideration by alleging a wholly new state of facts. He said that on the first Monday in January 1857, complainant came to him at Hillsville—told him that he had given his bonds to *Hutsell* for \$1,000—for land: that *Hutsell* was hard pushed for money, and would have to sell the bonds at a heavy discount: that as he, *Bailey* and *Tate* were friends and had had many dealings, he wanted *Tate* to make the profits, and also wanted *Tate* to have the bonds, as he could indulge the complainant if he should lack money to pay them off when they fell due: that the debts were *good debts*: that they were *all right*, and should be paid punctually: that he, *Tate*, lived in Wythe county, had no knowledge of *Hutsell's* condition and liabilities, and would not have bought the bonds except at complainant's instance, and upon his representations: that some days afterwards, *Hutsell's* son and agent came to *Tate* at Wytheville, and sold and assigned the two bonds falling due, to *Tate* for valuable consideration; and *Tate* under these circumstances, protested against loss on his part, but required that complainant should be held to pay his money.

The depositions sustained *Tate's* answer: two witnesses swearing that they heard *Bailey* acknowledge that he had requested and advised *Tate* to buy the bonds: and a third one, *Hutsell's* son and agent, stated that *Bailey* sent him to Wytheville to sell the notes to *Tate*, and that he knew nothing of *Tate*, and would not have gone to him except from *Bailey's* suggestion. But all the witnesses said that when *Bailey* admitted his request and advice to *Tate* to buy the bonds, he said that he had "acted in good faith"—"that he was candid in the matter," and "thought the bonds were all right," and "did not then know that the land was deficient." It was admitted that *Hutsell* was insolvent. As to him the bill was confessed.

The cause was set down for hearing, and for satisfactory reasons was sent down to Wythe for trial.

Brown for plaintiff.

Terry for defendant *Crawford*.

Cook for defendant *Tate*.

Brown contended that there was nothing to take this case out of the general rule, that the assignee must stand in the position of his assignor. That there was a deficiency of the land to the extent of 81 acres and more, and to that extent complainant ought to be discharged. He contended that *Bailey* had acted in good faith: that he was himself ignorant of his equity when he advised *Tate* to take the assignment: that there had been no fraud nor concealment on his part: and that there was no proof of any promise on his part to pay the debts to *Tate*. That fact was alleged in *Tate's* answer; but being an independent allegation it required proof, which was not furnished, and he contended that nothing but fraud or an *express promise to pay* could make the obligor liable to the assignor when there was equity against the debt; and he referred to Tucker's Commentaries, Book 2d, p. 348.

Terry, for the defendant, *Crawford*, contended that he was at any rate entitled to the price of the land which the complainant admitted himself to have received, which *Crawford* claimed to be *twenty-five* acres. Complainant, by his receipt endorsed on the title bond, had acknowledged that he had received *twenty-five* acres, and he ought not to be allowed to dispute the fact. But even if he had only received eighteen acres, yet there was a conveyance of 225 acres—and the loss of the seven acres ought not to fall entirely on the 100 acre parcel bought by complainant for his own use, but ought to be cast in proper proportion upon the whole tenement.

Cook, for defendant, *Tate*, submitted that the plaintiff had by

his own act, precluded himself from setting up this alleged equity against an assignee whom he had induced to purchase the bonds. An obligor may have a good equitable defence as against the obligee, yet be held to have waived it *quoad* the assignee. This is a stronger case than any reported in the books; for here the obligor did not wait to be questioned on the subject, but went to the assignee and requested him to take the assignment. No express promise was necessary to fix the liability of the plaintiff; the court would not permit him to deny a promise of payment. Nor was it material that he was ignorant of the failure of consideration when he induced *Tate* to take the bonds. He had ample opportunity—four months time—to learn the truth, and never took a single step towards learning it; yet goes on to lead an innocent man into difficulties. This was gross negligence, and he ought to bear the consequences. He referred to the following authorities: *Buckner, &c. v. Smith, &c.*, 1 Wash. 296; *Hoomes v. Smock*, Ibid, 390; *Corbin v. Southgate*, 3 Hen. & Mun. 319; *Mayo v. Giles*, 1 Mun. 533; *Stone v. Ware*, 6 Mun. 541; *Dickenson v. Davis*, 2 Leigh 401; *Thomas v. Davis*, 5 Leigh 1; *Teagle v. Dillard*, Ibid. 30; *Pettit v. Jennings*, 2 Rob. Rep. 676.

FULKERSON, J., (sitting for Judge Fulton.)

So far as the defendant *Crawford* is concerned, there can be but little question. As a general rule, the assignee of a bond stands in no better condition than his assignor. If the latter cannot recover the debt, the former must also fail. This is not merely a rule established by judicial decisions; it results from a positive legislative enactment, which requires the assignee to allow all just discounts against his assignor. Applying this rule to this case, the defendant *Crawford* can only recover what his assignor, *Hutsell* could claim. *Crawford*, so far as appears, is a voluntary assignee. He purchased the first bond without any communication with the obligor, *Bailey*, who in no way induced *Crawford* to take the bond; and therefore *Crawford* can only recover so much as *Bailey* can be held to pay. *Bailey* admits that he owes \$183 and some cents—the price of eighteen acres and a fraction. This amount, I think, *Crawford* ought to have. He was assignee of the bond first falling due, and his claim is also fortified by a judgment. But at the same time I think *Bailey* ought not to pay damages on this sum. I therefore shall dissolve the injunction to the judgment obtained by *Crawford*, to the extent of \$183, but without damages. As there is a question as to the actual quantity of land to which *Hutsell* made a good title, I shall continue the injunction till the next term, to give the parties an opportunity to settle the question;

merely observing that the burden is upon the plaintiff to show that he did not get the twenty-five acres; and that it will require clear proof on this point to rebut the effect of his written acknowledgement.

But the defendant *Tate* stands on wholly different grounds. It is clearly proved that *Bailey* induced *Tate* to purchase these two bonds. The authorities establish the principle beyond all question, that the obligor in a bond shall not be allowed to set up any equity, or any offset against the debt, when he has induced the assignee to take the assignment and advance his money. But this is a stronger case than any cited at the bar. In all of them the assignee applied to the obligor to learn whether there was any objection to payment. But here the obligor himself took the initiative. He went to *Tate*—informed him of the existence of the bonds—stated that they were all correct, and urged him to buy them. Now these facts are amply sufficient to bring the plaintiff within the operation of the rule established in the cases cited at bar, unless he can show something to exempt him from the liability, arising from the inducements which he held out to the assignee.

His first ground of objection is that he did not *promise* to pay these debts to the assignee. It is true that no express promise appears to have been made. *Tate* alleges such promise in his answer, but the allegation is not sustained by proof. But is such *express promise* necessary to render the plaintiff here liable? In most, if not all the cases cited by *Tate's* counsel, there was such a promise, and the plaintiff's counsel therefore insists that those cases are not applicable to this; and he also relies upon an expression of Judge TUCKER, in his Commentaries, which seems to favor the idea that either fraud or an express promise is necessary to consummate the liability of the obligor. But this was merely an opinion of that eminent jurist—entitled to respect, it is true—but not a judicial decision of the question, binding upon this court: and in none of these cases is it decided that such express promise is necessary. Such promise existed in those cases, and they only decide that such promise was obligatory. They do not establish the proposition contended for by the plaintiff's counsel. And in the absence of any binding authority to that effect I cannot, at least in this case, hold such promise to be necessary. Look at the position of the parties. The plaintiff comes to the defendant; tells him that he has *already* promised to pay this debt, and that too in the most solemn form of promise—by the execution of his bonds; that the debts are "good;" that they are "all right;" and entreats him to buy them. Now what other promise could he make: what other promise could *Tate* require: what other promise would equity or ordinary good sense and fair dealing

require? None. I do not think that the court ought to permit the plaintiff to deny, under such circumstances, that he promised to pay the debt to *Tate*, or to attach any weight to such denial, even if made; and on the ground of the absence of proof of an express promise to pay the debt to *Tate*, I cannot hold the plaintiff to be discharged.

The plaintiff's other ground of exemption is that he was guilty of no fraud in this transaction: that he acted *bona fide*: that he concealed no fact within his knowledge; and that if he misled *Tate*, it was because he was himself deceived. This may be admitted, and yet it will afford no ground for discharging the plaintiff from his obligation. What were the facts? The plaintiff bought this land on or before the first day of September 1856. It was in the early part of January 1857—after the lapse of *four months*, that he applied to *Tate* to buy these bonds, *Tate* being utterly ignorant of the whole matter. Whose duty was it to have learned the truth? On whom ought the loss to fall? Surely not on the innocent assignee. *Bailey* uttered no word of warning: he gave not the slightest intimation of any doubt as to the validity of the consideration. Nay, even after this the plaintiff again actively engages in the transaction by sending *Hutsell* to *Tate* for the very purpose of selling these bonds. In all this time the plaintiff had not seen proper to take a single step—to make a single enquiry in relation to the title to the land. Without any such enquiry he chooses to involve another man in this affair: to induce that man to expend his money in the purchase of these bonds. Under such circumstances would it be just to allow the plaintiff to cast the consequences of his own negligence on the person whom he has so heedlessly led into trouble? The plaintiff's most extraordinary negligence has caused this whole difficulty. If he had done what was incumbent upon him, even for his own protection, he never could, and I presume never would have attempted to lead *Tate* into difficulty. I do not impute any fraud in this instance; but to sustain the plaintiff here would be to open the door to the most enormous frauds; to enable the obligor and obligee in any bond to defraud the assignee. It was the plaintiff's duty to learn the true state of the title before he undertook to lead another into this entanglement: he had ample time and opportunity to have obtained the information: he offers not the slightest excuse for his negligence, and that negligence has had, *quoad* the assignee, all the injurious effect of an intentional fraud; and I think the plaintiff must therefore bear the loss. Sugden in his work on Vendors and Purchasers, discussing the rule which forbids an incumbrancer or claimant to set up his demand, after having permitted or induced a third party to buy the property, says in chap. 22, sec. 1, par-

agraph 32, "and the same rule prevails even where the representation is made through mistake, if the person making it *might have had* notice of his right."

The only remaining question is as to what relief *Tate* ought to have. All the parties and the whole subject matter being before the court, I must make a final decree as to everything that I can settle. The question arises whether *Bailey* ought to pay *Tate* the whole amount of the debts, or only so much as *Tate* paid to *Hutsell*. A similar question arose in *Pettit v. Jennings*, in 2 Rob., where Judge ALLEN treats it as an open question. In this case *Bailey* must have a decree over against *Hutsell* for all that he may have to pay *Tate*. In an action upon the contract of assignment, *Tate* could recover from *Hutsell* only so much money as he actually advanced, which appears to have been *seventy per cent.* of the nominal amount of the debts, with interest from the date of the assignment. *Hutsell* ought not to be subjected to the payment of more than he received. *Seventy per cent.* of these bonds amounts to \$466 67. I shall give *Tate* a decree against *Bailey* for that sum, with interest from January 13, 1857, and costs; and as to *Tate* the bill is to stand dismissed, and *Bailey* is to have a decree over against *Hutsell* for the amount decreed to *Tate*.

Decree accordingly.

MARRIED WOMAN'S RIGHTS. DIVORCE.

Fender vs. Reeves and another.

Circuit Court of Grayson Co., Va. September Term, 1858.

A married woman cannot recover in an action for personal property, even though she be living separate from her husband, and has acquired the property since the separation.

In such case no plea in abatement is necessary, the question being as to the right of property, and such right held to be in the husband.

A *divorce* cannot be proved by parol testimony.

Several executions in favor of *P. B. Reeves*, against *E. C. Reeves*, were levied on certain goods and chattels alleged to be the debtor's property. *Susanna Fender* claimed the goods as her property: the officer demanded an indemnifying bond, which was given by *P. B. Reeves*, with a surety: the goods were sold, and then *Fender* brought this suit on the bond.

The declaration was in the usual form, setting out the bond, and alleging the goods to be *Fender's property*. Pleas—"Conditions performed," and "*non-damnificatus*."

McCamant & Brown, for the plaintiff.

Floyd & Cook, for the defendants.

Brown, in opening the case, stated, that his client had, several years ago, been married in North Carolina, to one *Isom Fender*, who still resided in that state; that they had separated, and the plaintiff had removed into Virginia, and had been living in Grayson for several years, and had there acquired the property for which this action was brought. He also stated, that her husband had obtained a divorce from the plaintiff in North Carolina, since she left him. The other party stated their ground of defence to be, that the goods in question *did not belong to the relatrix, Susanna Fender*.

The plaintiff introduced evidence tending to show that the goods in question were her property. On cross-examination of her witnesses it appeared that she had been married in Carolina, and that her husband was still living; and the witnesses said that she and her husband had "dissolved partnership." She had left her husband, and had been for five or six years living with the execution debtor, *E. C. Reeves*, during which time she had given birth to three or four children. She and *Reeves* inhabited the same house, he being an unmarried man: the property in controversy was all on the premises jointly occupied by them, and *Reeves* constantly used it, frequently speaking of it as his own; but being introduced as a witness, (on the authority of *Patteson v. Ford*, 2d Grat. 18,) he denied that it was his property, and said that it belonged to the relatrix. The defendants introduced evidence tending to impeach the plaintiff's testimony, and to show that the property really belonged to *E. C. Reeves*.

After the evidence was heard, the defendants moved the court to give the jury this instruction: "If the jury believe from the evidence, that the relatrix, *Susanna Fender*, is a married woman, then the plaintiff cannot recover in this action, because the right of property in the goods and chattels in controversy is not in her, but in her husband, and the jury must find for the defendants."

The plaintiff's counsel opposed this instruction, not only because, as they contended, it did not correctly expound the law, as the wife was living apart from her husband, but be-

cause if there was force in the proposition, the coverture ought to have been pleaded *in abatement*.

The defendants' counsel insisted that their objection did not go to the power of the relatrix to maintain *an action at all*; that objection was lost by the failure to plead in abatement: but their position was that, conceding the action to have been well brought, she could not recover *these particular goods and chattels*, because they belonged to *another person*—to wit: her husband. *Susanna Fender* had no right of property in these effects. The right of action in regard to them was in the husband. *He* could institute his action, and he alone, according to the evidence, could recover. (See Tuck-er's Comm., Book 1, p. 116; 3d Idem, 87; 2d Starkie, 690.)

FULKERSON, J. (sitting in place of Judge *Fulton*.)

I think this instruction is a sound exposition of the law. All goods and chattels acquired by the wife, or in her right, belong to the husband absolutely, unless there be some marriage settlement to the contrary, or some other impediment to the husband's rights, nothing of which is here pretended. Nor was there any necessity for a plea in abatement in this instance. By failing to plead in abatement, the defendants concede only the wife's right to sue: they do not admit her right to *recover*, if the evidence shows the property to belong to another. This woman's difficulty arises here from the evidence that the *right of property* is not in her. She stands in the attitude of any other claimant of the goods, who might certainly bring his action, but would fail upon the trial, for the reason that the property was shown to belong to some one else. Taking the evidence at the strongest, so far as she is concerned, it only shows that the property belongs, as against her, to the husband; that therefore the right to recover it is only in him, and that *she* must go out of court. I will give the instruction.

The plaintiff's counsel then insisted, that one of the witnesses had stated that there had been a divorce between the relatrix and her husband, and asked the jury still to find for the plaintiff. The defendants' counsel denied that any such statement had been made, and also asked the court to say to the jury that parol evidence was insufficient to prove a divorce.

FULKERSON, J.

I did not hear any such statement from a witness; but that is a matter for the jury to settle. But in my opinion, parol evidence is inadmissible to prove such a fact. A *di-*

force is effected either by judicial decision or legislative enactment, and neither can be proved by parol.

Verdict *for the defendants*. Judgment accordingly, and no exceptions.

BOND. NON EST FACTUM. PLEADING.

Fielder vs. Perkins and others.

Circuit Court of Grayson County, Va. Sept. Term, 1858.

Several parties sign their names and affix their seals to a blank piece of paper, *intending* to become sureties for a deputy sheriff; a bond is subsequently written above their signatures, without their knowledge or consent: this bond is void.

When a bond is used as *evidence* only of the liability of the alleged obligors, and not as the *foundation* of the action, it is not necessary to deny the validity of the obligation by any plea in the name of a plea of *non est factum*, nor by affidavit.

No bond is necessary to render a deputy sheriff liable to his principal; that liability arises *ex officio*.

This was a motion by the high sheriff of Grayson county, against his deputy and the sureties of the deputy. The nature of the proceeding, the facts of the case, the questions discussed by counsel, and the authorities cited, are so fully set out, in the court's opinion, as to dispense with any preliminary statement.

McCamant & Davis, for the plaintiff.

Floyd, Cook & Brown, for the defendants.

FULKERSON, J. (sitting in place of Judge Fulton.)

The plaintiff, *Dennis Fielder*, was duly elected and qualified as sheriff of Grayson, for the term commencing on the 1st day of January, 1857. He appointed the defendant *L. J. Perkins* his deputy. The taxes assessed in Grayson for the year 1857 not having been paid, the Auditor of Public Accounts moved against *Fielder and his sureties*, and recovered judgment therefor: and as this failure is alleged to have been caused by the default of the deputy, *Perkins*, the high sheriff has made this motion against *Perkins* and the other defendants, who are alleged to be the sureties of *Per-*

kins in his bond, given to indemnify the high sheriff. It is clearly proved—indeed admitted—that the judgment against the plaintiff was occasioned by the default of *Perkins*; and the latter and his sureties (if he has any sureties) are liable to indemnify the sheriff.

So far as the deputy himself is concerned, nothing is shown to relieve him from liability. His liability does not arise from any bond or special obligation. The acceptance of the office of deputy is sufficient to bind him to make good any loss which his misconduct has imposed upon his principal. As against him, the facts already stated are sufficient to authorize a judgment for the plaintiff.

But as to the other defendants, the case is wholly different. They are alleged in the notice to be sureties of *Perkins* in his bond as deputy sheriff. Having nothing to do with the office itself, they can be bound to indemnify the plaintiff only so far as they have, by express contract, assumed that duty upon themselves. Such contract would be wholly private in its character; and the contracting parties could give it any character and force they might desire. Accordingly, the plaintiff does rely upon such a contract. He has exhibited a bond, dated on the 23d December, 1856, (shortly before *Perkins* entered on the discharge of his duties,) signed and sealed by *Perkins* and the other defendants, in the penalty of \$30,000, and conditioned that "the said *L. J. Perkins* shall well and truly perform all the duties of his said office of deputy sheriff, and keep the said *Fielder* free and harmless from all loss and damage in the said office of sheriff."

The defendants meet this paper by a denial of its legal validity and binding force as against them, because, as they say, they never executed any such paper: in other words, they say that it is not their deed. And just here I may dispose of one of the questions made at bar. The counsel for the plaintiff raised the question whether the defendants could controvert the fact that this paper was their bond, without a plea of *non est factum*. But such a plea is unnecessary, indeed inadmissible in this case. This proceeding is not founded on the bond. The defendants are proceeded against as sureties of *Perkins*, and the bond is introduced only as evidence that they are such sureties. When a bond is used in such a collateral way, no plea or affidavit is necessary to authorize the obligor, or supposed obligor, to raise the question whether it be his deed or not. It being only evidence, and not the foundation of the action, the obligor is not *estopped*, but may repel this evidence by any testimony which shows that the instrument is not obligatory upon him.

See 1st Greenleaf's Evid., sec. 284, p. 373; Ibid. vol. 2, sec. 293, p. 310.

Conceding, then, that the sureties are not estopped to disprove the obligatory force of this instrument, let us see what facts are clearly established in relation to it. It does not appear that the plaintiff required his deputy, *Perkins*, to give any bond, at the time of his appointment. But, in August, 1857, after *Perkins* had been acting as sheriff for several months; after it had become his duty to collect the taxes, and after he had received the books containing the tax lists, the plaintiff required him to give bond. On or about the 24th August, *Perkins* attached his signature and seal to a piece of blank paper, and procured the other defendants to do the same. The defendants did not act in concert, but put their hands and seals to the paper at different times and places. *Perkins* handed this paper to the clerk of the county court, with nothing at all written upon it over the signatures and seals. The clerk kept it in this condition for several weeks, when he and another person wrote upon it the obligation which it now bears. This was done without the knowledge, consent or direction of *Perkins*, or any one else. No one of the supposed obligors ever directed any writing to be placed upon the paper: no one ever acknowledged it as his deed after it was written.

This paper is, I think, utterly void; and in so saying I am sustained by many authorities, of which the case of *Rhea vs. Gibson's ex'or*, 10 Grat., 215, is the most important and satisfactory. The question was there elaborately argued, and the authorities carefully considered, and the conclusion drawn by the court there is even more clear in this case than in that. In that case a bond had been drawn up, with a blank for the *sum*: that blank was filled in the absence and without the knowledge of the surety, and the court of appeals held that it was not his bond. Our case is a far stronger one, for here the whole bond was written on this paper without the knowledge and in the absence of the sureties. Among the authorities cited in *Rhea vs. Gibson*, is the case of *United States vs. Nelson & Myers*, 2d Brock., 64. In that case C. J. MARSHALL cites, with approbation, the quaint but forcible and appropriate language of the old common law writer, PERKINS—language which is decisive of this question: "The agreement must be all written before the sealing and delivery of it; for if a man seal and deliver an empty piece of paper or parchment, albeit he do withal give commandment that an obligation or other matter shall be written in it, and this be done accordingly, yet this is no good deed."

But the plaintiff's counsel contend, that we must here look to the *intention*. In their opinion it sufficiently appears that the defendants did intend to bind themselves as the sureties of *L. J. Perkins*, and therefore ask that the defendants shall be held to their undertaking. It was properly answered, that this intention can be only gathered from the paper itself, and that paper being held void, there is no evidence of *any* intention; for the statute of frauds forbids us from holding any person responsible "for the debt, *default* or misdoings of another," unless his agreement so to be held bound be witnessed by writing. Whatever may have been the intention of the parties, we can only look to the paper. This is not a court of equity, with power to reform instruments, and carry out the intentions of the parties; and even if it had such power, this is not a case in which it would be exercised. But what is the evidence of intention here? I think that even if we could look at the intention, the plaintiff wholly fails to make out a case. He filed interrogatories to *Hash* and *Thomas*, two of the sureties, requiring them to say whether, in putting their hands and seals to this paper, they did not *intend* to bind themselves as the sureties of *Perkins*. Those two defendants answer, that they did intend to be so held, *from and after the 24th day of August, 1857*, the time at which they signed the paper. Now this is all the evidence of intention. As against the other defendants, it is entirely inoperative: as against the two who have answered, it destroys the bond. They say that they only intended to become bound on the 24th day of August; so that they would have been liable for defaults of the deputy after that time—an undertaking which would not have made them responsible for *this* default; yet the paper has been dated on the 23rd December, 1856, and in its terms makes them responsible for the deputy's defaults during the whole term, as well before as after the time they agreed to make themselves responsible. As far as these two defendants are concerned, their intention was not carried out, and they are not liable.

The plaintiff can take judgment against his deputy if so advised; but as to the other defendants, he can take nothing by his motion, but must pay costs.

Ordered accordingly.

NEGOTIABLE PAPER PAST DUE. EQUITIES. ASSIGNMENT.
COLLATERALS.*Davis v. Miller &c.*

Supreme Court of Appeals of Virginia. Spring Term. 1857.

We promised in a preceding number to give a fuller report of this case, because of the importance of the principles discussed and decided in it, and had intended giving the opinion of Judge Moncure, who delivered the opinion of the court; but as the case in full will, we understand, be reported in a short while, in the next volume of Grattan, we deem it only necessary to report an abstract of the points determined by it.

The facts of the case, it will be remembered, were as follows: E. L. Fant & Co., being indebted to Miller & Mayhew, and having in the Merchants' Bank of Baltimore various notes, due to them, pledged to the said Bank, as collateral security for discounts, on the 30th May, 1850, gave Miller & Mayhew an order upon said Bank for the collaterals, when discharged from the lien of the Bank, which order was presented and accepted. On the 12th March, 1850, the said Bank discounted for Fant & Co. the note of R. M. Davis for \$694 75, payable at the Exchange Bank in Richmond, 28th—31st July, 1850. The note of Davis was protested and returned to the Merchants' Bank of Baltimore. On the 6th August, 1850, Miller & Mayhew loaned to Fant money, with which he retired the said note and immediately delivered it to them as collateral security. On the 9th of August, R. M. Davis paid to Fant & Co. the amount of the note and took their (Fant & Co.'s) receipt. Miller & Mayhew brought suit upon the note in the Circuit Court of Essex. At the trial, having proved the above circumstances, except the payment by Davis to Fant & Co., Davis the defendant offered Fant & Co.'s receipt, dated the 9th of August. The plaintiff moved the court to instruct the jury that upon the facts proved, the said receipt constituted no defence to the action. Which instruction the court gave. Verdict and judgment for plaintiff. The defendant excepted to the instruction and appealed.

Morson for the appellant contended:

1st. That the declaration being in the common form of an endorsee against the maker, upon an endorsement before the note was due, it was not sustained by the evidence, which showed the transfer to the plaintiffs after it was due and had been taken up by Fant & Co. The plaintiffs should have stated their case specially. *Bank of U. S. v. Jackson's adm'r*, 9 Leigh 221.

2nd. That the plaintiffs having taken the note after it was due and after

it had been retired by the parties who held it at the time it was dishonored, it was open to all the defences to which paper not negotiable was open. 2 Rob. Pr. 251; 1 Pars. Con. 213, 216, 217 and note. That the note having been taken as collateral security, the plaintiffs were not holders for value. *Prentice & Weissinger v. Zane*, 2 Grat. 262. On both grounds, the defendants having paid the note, without notice of transfer, the payment was valid and protected him.

Griswold for appellee contended:

1st. That the declaration was good, even against a demurer. As the plaintiffs had a right to declare as the immediate endorers of Fant & Co., citing Chit. on Bills, 135—46 and 359. *Peacock v. Rhodes*, Doug. 6 3. *Havens v. Huntington*, 1 Cowen 387.

2nd. That if declaration aver endorsement before security, and proofs show it to have been after, there is no material variance between the allegations and proofs. Chit. on Bills, 360. *Young v. Wright*, 1 Camp. 139. *Gold v. Eddy*, 1st Mass. R. 1. *Little v. O'Brien*, 9 Mass. R. 423. *Wardell v. Pinney*, 1 Wend. 217. *Lawson v. Toures*, 2 Ala. R. 373. *Caruthers v. West*, 63 Eng. Com. L. R. 143.

3rd. That after general verdict the objection came too late. Tuck. Com. Bk. 3rd, 304 to 310. *Digges v. Morris*, Hen. and Munf. 268.

4th. That although the endorsee of a note past due, takes it subject to the equities of the maker, yet the equities of which the maker may avail himself are only equities inherent in the note at the time of the transfer. 1 Pars. Con. 214—216, and the case in the notes; *Whitehead v. Walker*, 10 Mus. and Wils. 696; *Bonaugh v. Moss*, 10 Barn. and Cress. 558, 21 Eng. C. L. R. 128; *Carruthers v. West*, 63 Eng. C. L. R. 143; *Robinson v. Lyman*, 10 Conn. R. 30; *Perry v. Mays*, 2 Bailey's S. C. R. 354; *Cain v. Spaul*, 1 McMul. R. 258; *Hughes v. Large*, 2 Barr's R. 103; *Havens v. Huntington*, 1 Cow. R. 387; *Johnson v. Bloodgood*, 1 John. Cas. 51; *O'Callaghan v. Sawyer*, 5 John. R. 118, *Losee v. Duncan*, 7 Id. 70; *Baxter v. Little, &c.*, 6 Metc. 7; *Buchanan v. Wood*, 8 N. Hamp. R. 334; *Aunan v. Honck*, 4 Gill's R. 325.

5th. The endorser of a negotiable note transferred to him as collateral security for an antecedent debt, is a holder for value. *Swift v. Tyson*, 16 Peters 1. *Valette v. Mason*, 1 Ind. R. 89. *Chicopee Bank v. Chapin*, 8 Metc. 40, 1 New Jersey R. 665. *Depean v. Waddington*, 6 Wharton 220, 2 Am. Lea. Cas. 163.

MONCURE J. delivered the opinion of the court. The following syllabus of the decision by Mr. Grattan we take from an early proof of Mr. Grattan's 14th volume.

Daniel and Lee J.'s concurred in the opinion of Moncure, J.

Allen P. and Samuels J. dissented.

SYLLABUS.

1. Payment by the maker to the payee and endorser of a negotiable note, after it has been protested for non-payment, ta-

ken up by the payee and transferred by him to his creditors as collateral security for a larger debt, such payment being made without knowledge of the transfer, is not a good defence to an action brought on the note by the transferee and holder against the maker.

2. Payment of a dishonoured note, by an endorser does not extinguish its negotiability as to him and all parties liable thereon to him, though it discharges the liability of subsequent endorsers, whose liability will not be revived by his putting the note again in circulation.

3. Where an overdue note is transferred, the holder takes it subject to all the defences and equities to which it was subject in the hands of his immediate endorser, whether or not, he has any notice thereof: except that an accommodation note in his hands is not therefore invalid.

4. *Quære*: If the equities to which such overdue note is subject, in the hands of the endorsee, are or are not, only such equities as attach to the note itself; as illegality or want or failure of consideration, or a release or payment, or a counter claim agreed to be set off, which is equivalent to payment.

5. A set off as between the maker and the payee acquired after the transfer of an overdue note, though acquired without notice of the transfer of the note, cannot be set off against the holder.

6. By the endorsement of negotiable notes, though overdue, the legal title passes, without notice to the maker. But in the case of transfers of choses in action not negotiable, only the equitable title passes and the maker may make payments to the payee or obligee, until he has notice of the transfer.

7. The act, Code, ch. 144, § 14, p. 583, in relation to suits by assignees, does not apply to negotiable paper; though such paper has been transferred after due.

8. The declaration on a negotiable note, states the endorsement and delivery as at the time of the making; and the proof is that the delivery was after the note fell due: this is no variance, and if it were, could only be taken advantage of, at the trial, by a motion to exclude the evidence, or to instruct the jury to disregard it.

9. Where the plaintiff's case is clearly made out, and the only question is, whether the defendant has made a good defence; it is not deciding upon the weight of evidence, to instruct the jury, upon the assumption of the facts as true, that the defence is not sufficient, if the instruction itself is correct.

BAILEY ET. ALS. v. POINDEXTER'S EXOR.

At the request of many members of the bar, we publish the dissenting opinion of Judge Moncure in the case of *Bailey et. als. v. Poindexter's exor.* It will be remembered that we have already published the opinion of the Court in this case as delivered by Judge Daniel and the arguments of one of the counsel in opposition to the right of a slave to elect to be free, under a will conferring a conditional emancipation. We think it but fair that the other side should have a hearing.—ED.

MONCURE, J.

I think the bequest contained in the will of John L. Poindexter, that the negroes loaned to his wife for life should at her death "have their choice of being emancipated or sold publicly," is a valid bequest, and emancipated them *in futuro*, upon a condition precedent.

Whether a master should have power to emancipate his slave or not, is a question which addresses itself to the *legislative*, and not the *judicial* department of the government. It was answered by the legislature by the act of 1782, giving the right to emancipate by will or by deed. That act, substantially, has ever since remained, and yet remains, in full force: modified only by the act of 1806, requiring slaves thereafter emancipated to leave the state.

That a master may emancipate his slaves, to take effect *in futuro*; as for instance, after the death of his wife; has been repeatedly adjudged by this court, and may now be considered as the settled law of the land.

That a master may emancipate his slaves upon a condition precedent, if there be nothing unlawful in the condition, is a proposition which will not be denied: as for instance, if his wife die without issue living at her death. This would not only be a lawful but a reasonable condition, having for its object a provision for the issue, but for which the emancipation would be absolute. But no condition however unreasonable or even capricious would, on that account merely, be unlawful.

A master may emancipate his slaves *against* their consent. Why may he not make such consent the condition of emancipation? There seems to be nothing in the policy of the law which forbids his doing so. He may certainly, in his lifetime, consult the wishes of his slaves, and emancipate them or not accordingly. Why may he not direct his executor to consult their wishes, and emancipate them or not accordingly? Is not the one as much opposed to the policy of

the law as the other? the consultation by the master, as much as the consultation by the executor?

It may be said that one is an *executed*, and the other an *executory* act of emancipation. But both are, in fact, executed acts. Both of them, so to speak, convey an estate or interest—a right to freedom; the one absolute, the other a conditional right. The latter is as much an executed act as if the condition were wholly independent of the wishes of the slaves.

If the slaves were wholly incapable of making a *discreet* choice, and could merely guess what was best for them, there would be nothing in that incapacity which would make the condition unlawful. As before stated, a condition is not unlawful, merely because unreasonable or even capricious.

But slaves have *some* capacity to choose, though it may, generally, be very weak and imperfect. They are responsible for their criminal acts; and may incur, and have to suffer the heaviest penalty of the law. The moment they become free they are legally capable, without any increase of intelligence, of making contracts, buying and selling property, and doing other acts which require the exercise of mental faculties. And as the law now is, they may, by their own choice, return again to slavery. Slaves have certainly feelings and wishes which the master may be willing to consult in regard to their emancipation. To do so, is not to create that middle state between slavery and freedom, which is unlawful. It is merely to propound a question to a slave requiring a categorical answer. If he wishes to be free, he is made a freeman in an instant; but is made so by the act of his master, whether that act be executed before or after the expression of his wish; provided it be executed according to law. There is not a particle of time intervening between his slavery and his freedom; and so no particle of time in which he occupies a state between the two.

The dominion of a master over his slaves (as over his other property) may be exercised not only by an act which is to operate during his life, but by an act which is not to operate till after his death; and that dominion embraces the power of emancipation. He may emancipate them by deed or by will—in *presenti* or *in futuro*—absolutely or conditionally. If he attempt to violate the policy of the law, by creating a mixed state of slavery and freedom, his act will be void: or if he violate a rule of law, by annexing to a gift of the slaves a condition which is repugnant to the gift, the condition will be void. And his act of emancipation, whether ab-

solute or conditional, *in presenti* or *in futuro*, by deed or by will, is in subordination to the claims of creditors, and to the obligation of the master to indemnify the community against the expense of slaves likely to become chargeable.

His legatees, certainly, cannot complain of his act or the manner in which he has seen fit to exercise it. They can claim only what he has chosen to give them; and cannot complain that he has given them his slaves only on condition that they prefer to remain in slavery. It was *his* to give them absolutely or conditionally; and it is *theirs* to refuse or accept them as given. There is nothing in the policy of the law which requires them to claim the slaves against his will. They certainly may, if they choose, give effect to it. Why should they not be compelled, if need be, to do so? Why should they be permitted, contrary to the general rule, to claim under and against the will? The intention of the testator, if lawful, must prevail. It is a law to all who claim under his will. They must do all they can to give effect to it.

It is argued, that slaves have no civil rights or legal capacity, and cannot therefore elect between freedom and slavery, though authorized to do so by their master. The premises of this argument are certainly true, at least as a general rule, but the conclusion is, I think, unsound. The fallacy of the argument (if I may be allowed to say so) consists in supposing that to make such an election would be to exercise a civil right or capacity. It is admitted that slaves are capable of receiving freedom, if conferred in the mode prescribed by law. It must also be admitted that it may be conferred conditionally. It was so conferred in the cases of *Pleasants v. Pleasants*, 2 Call 319; *Elder v. Elder's ex'or*, 4 Leigh 252; *Dawson v. Dawson's ex'or*, 10 Id. 602; and *Hepburn, &c. v. Dundas, &c.* 13 Gratt. 219. The right to confer it absolutely, which the law expressly gives, includes the right to confer it conditionally. The only question is, Whether such condition may be the willingness of the slave to receive his freedom. Why may it not? Slaves emancipated absolutely, still have an election between freedom and slavery. They may become slaves again under the provisions in the Code, p. 466, § 1, and p. 746, § 26; or under the act of February 18, 1856, Sess. Acts, p. 37. Why may not the master give them such an election directly, instead of giving it to them indirectly, by first making them free? Why should he be compelled to lose his property in such of his slaves as prefer to remain so, in order that he may give freedom to such as prefer it? It is said that a slave eman-

ipated by an election given him by his master, would become free by his own act, and not by the act of his master. But this is not so. A slave can become free only by the act of his master; and the act must be done in a certain prescribed mode. When the act has been done in that mode, it may be made to depend on the willingness of the slave as well as upon any other condition. And whether made to depend on that or any other condition, it is the act of the master, and not the happening or performance of the condition which confers the right of freedom. The agency by which the condition is performed, is constituted by the master; and such performance is thus, in effect, his own act. There is nothing in the relation of master and slave, nor in the condition of slavery, which can prevent a master from adopting the agency of his slave for such a purpose. He can do so on the same principle on which it is admitted he may make his slave his agent for other purposes. Certainly nothing is better settled than that a slave cannot make a valid contract, even for his own freedom; and cannot enforce the execution of a promise of his master, even though it be to confer freedom upon him, and though the consideration on which it was made has been fully performed on the part of the slave. But it is equally well settled that a slave may avail himself of an act of emancipation duly executed by his master, whether such emancipation be absolute or conditional.

But if it can properly be said, that to make such an election would be to exercise a civil right or capacity, it would be as a mere incident to a capacity which is expressly given by law. A slave, as before stated, is certainly capable of receiving his freedom. And, if it be conferred in the mode prescribed by law; that is, by deed or will duly executed and recorded, he may propound such deed or will for probate, and may appeal from a sentence against him. He may sue *in forma pauperis* for his freedom, and may resort to a court of equity for relief when he has no adequate remedy at law. It is as competent for a slave emancipated on condition that he elects to be free, to make such election, as it is for a slave absolutely emancipated to propound the deed or will for probate, appeal from the sentence, or sue for his freedom. Such right of election is incident, as such remedies are incident, to the legal capacity of the slave to receive his freedom.

If this were a new question, therefore, and especially if it be conceded, as it now must be, that emancipations *in futuro* are lawful, I would think the condition lawful and the emancipation valid in this case.

But I regard the question as *res adjudicata*. *Elder v. El-*

der, I think, has decided it. I would feel myself bound by that decision, even if I doubted its soundness. It is a case of the highest authority, having been argued by very able counsel, and having been decided by a unanimous court of four of our ablest judges, Tucker, Brooke, Cabell and Carr, Judge Green being absent from sickness. It was decided in 1833, a quarter of a century ago, and has ever since been regarded as a binding authority. On the faith of it counsel have advised, testators have made their wills, courts have construed them, and executors have carried them into effect. To disregard it now, and decide otherwise, may be attended with the greatest evils. The same reasons which are said to require us to disregard that case, seem equally to require us to disregard all the cases which decide that emancipations *in futuro* are lawful; and thus the whole law would be unsettled in regard to the emancipation of slaves.

But it is said that the question was not raised nor decided in *Elder v. Elder*; that the order in that case appointing "commissioners to examine privily and impartially all the slaves of the testator's estate, and to ascertain from each and report to the court, whether he or she was willing to go to Liberia," was made by consent of parties; and therefore that the question is not *res adjudicata*. The bill which was filed by the residuary legatee, alleged that the slaves conditionally emancipated by the will had never elected to go to Liberia; but that, on the contrary, the executor having fully explained the will to them, and their rights under it, they had declared they would not go to Liberia, and preferred to remain in Virginia in slavery; and that they had remained here for near two years since the testator's death. The executor, in his answer, stated that the other personal estate of the testator being inadequate to the payment of his debts, he had hired out the slaves for that purpose, and had not yet given them their election, though he had explained their rights to them, and did not doubt that when they should be allowed to make their election, they would prefer to go to Liberia. In this state of the pleadings the consent order was made. The commissioners reported that all of the slaves except one preferred to accept their freedom and go to Liberia; and the court decreed accordingly. The argument of the case in this court is not reported; and we can only infer what it was from the opinions of the judges. It is reasonable to infer that among the points argued, were those which were decided. It was decided among other things, that such of the slaves as preferred to go to Liberia were effectually emancipated; and that it was unnecessary, to perfect their

title to freedom, that they should elect to go within twelve months after the testator's death, provided they made such election when it was offered to them; or that the Colonization Society should agree to defray the expenses of sending them; provided any person should agree to do so. It appears from the opinion of President Tucker, that these points were argued by counsel. It cannot be said with propriety that they did not arise in the case; or that it was improper for the court to decide them; or that the fact that the order before mentioned was by consent, affected the decision. If the slaves really had been unwilling to go to Liberia, as the bill alleged, a report of that fact by the commissioners would have put an end to the case; and therefore the plaintiff consented to an order appointing commissioners to ascertain the fact; but he did not intend thereby to waive any right he might have to the slaves, even though they might be willing to go to Liberia. Nor did the order have that effect. Carr, J. said, "In the construction of wills, we are to find out the meaning, the intention, the will of the testator; and unless that violates some principle of law, it must be carried into execution." He thought the intention plain in the case, and that it did not violate any principle of law. Cabell, J. said "The intention of the testator to emancipate his slaves, is too evident to require argument; and it is equally clear that there is nothing illegal in the mode which he has adopted for the execution of that intention. Slaves may be emancipated by deed or will, at the pleasure of their owners; but they forfeit their freedom unless they remove, within twelve months, beyond the limits of the commonwealth. It can therefore be no objection to the emancipation in this case, that the testator has directed it on the condition of their willingness to go to Liberia." Brooke, J. concurred. Tucker, P. said, "The first questions in this case turn upon the intention of the testator, and the legality of that intention. Of the intention, I think there can be no reasonable doubt." "As little doubt exists of the legality of this intention. The slaves were not to be free until they were sent to Liberia; and they were not to be sent there against their consent. It is not perceived that there is any thing in the policy of the law, as there certainly is not in its statutory provisions, which forbids an emancipation by transportation to a free colony." None of the judges seem to have had any doubt upon the question, whether the conditional emancipation of the slaves was valid. Their decision of that question seems to be in accordance with the construction which has

uniformly been put upon the act of 1782, and acquiesced in ever since its passage.

In *Pleasants v. Pleasants*, 2 Call 319, the wills of John and Jonathan Pleasants, which were the subjects of controversy, were made before the passage of that act, when it was not lawful to emancipate slaves in this state; and the case was decided shortly thereafter. The will of John was, that his slaves should be free *if they chose it*, when they arrived at the age of thirty years, and the laws of the land would admit them to be set free without their being transported out of the country, &c. The will of Jonathan was, that whenever the laws of the country would admit absolute freedom to them, his slaves should, on their coming to the age of thirty years, become free, *or at least such as would accept their freedom*. The court, consisting of Judges Pendleton, Carrington and Roane, unanimously held that the slaves were entitled to their freedom. Nothing was said in the case about the right of election given to the slaves. The great question was, whether the doctrine of perpetuities and executory limitations applied to the case; and whether, according to that doctrine, the bequest of freedom was limited on a contingency too remote? It did not occur to the counsel or the court that an election between freedom and slavery could not be given to slaves under the act of 1782. If it had, it is incredible that the objection would not have been taken or suggested by some of them. It is said, that the objection was not taken because the emancipation was considered to be absolute. It can hardly be supposed that the counsel for the claimants of the slaves would have admitted, without a question, that the emancipation was absolute, if it had been considered that its validity depended upon *that*. An order to take the election of the slaves was doubtless not applied for, because it was known that all would elect their freedom; especially as, by the act of 1782, they were not required to leave the state. I regard *Pleasants v. Pleasants* as a case of great importance on the question under consideration. It involved a large amount of property, and the freedom of a great many negroes. It was argued by very able lawyers, and decided by very eminent judges, who had the best opportunity of knowing the meaning and policy of the act; and it may almost be considered as a contemporaneous exposition thereof. No subsequent decision of this court has impaired the authority of the case; nor has the doctrine settled by it been changed by subsequent legislation; though there have since been several general revisions of our laws, and two conventions to amend our constitution.

That case was followed by *Elder v. Elder*, in which the question of the right of election was more distinctly presented by the will, and raised by the pleadings and proceedings, and in which as we have seen, the most confident opinions were expressed by the judges in affirmance of the right.

Elder v. Elder, in its turn, was followed by *Dawson v. Dawson's ex'or*, &c. 10 Leigh 602, in which the testator directed all his slaves to be emancipated and sent to a country where slavery is not tolerated, if, within twelve months, they should elect to be emancipated on these terms; otherwise to be sold. It was tacitly conceded by all parties in the case, and by the court below and this court, that the right of election existed. The matter directly in controversy was the right to the Bell-Air tract of land, which by the codicil was given to "Benjamin Dawson, for the equitable support and maintenance of the slave population thereon." Benjamin Dawson claimed under the codicil an absolute estate in the land and slaves thereon. The court below decided that the codicil gave him only the use thereof, in trust for the support and maintenance of the slaves during the interval of twelve months or longer, which might elapse between the death of the testator and the election of the slaves; but that nevertheless, as the slaves were not yet freedmen, and would not be until they so elected, they therefore had no capacity to enforce against Dawson the trustee any accountability over and above their maintenance; and he was entitled to all the profits beyond, discharged of the trust, namely, the use of the Bell-Air estate until all the slaves thereon should make their election. This court, consisting of Tucker, Brooke and Cabell, unanimously affirmed the decree. In doing so, they must have affirmed the validity of the conditional emancipation of the slaves; for otherwise the trust created for their support would have been void, and Benjamin Dawson could have had no interest in the Bell-Air estate. The most that can be said against the authority of the case is, that the question as to the validity of such an emancipation was not directly raised. The plain reason why it was not is, that neither the parties nor the counsel nor the court seem to have entertained any doubt upon the question. And this shows how uniform and universal has been the opinion which has prevailed upon the subject.

The principle thus recognized, affirmed and acted on in *Elder v. Elder's ex'or*, and *Dawson v. Dawson's ex'or*, has never since been questioned in this court, nor changed by legislation; though there have since been, besides many annual

sessions of the legislature, one general revision of our laws, and one session of a convention to amend the constitution.

If public opinion has undergone any change as to the policy or propriety of authorizing masters to emancipate their slaves, or to emancipate them *in futuro* or upon condition, such change must develop itself in the action of the legislature, and not of the courts, whose business it is *jus dicere*, *non jus dare*, to expound the law as it is written and settled, and not as it ought to be, or as it may be supposed that public opinion would have it to be.

There are certainly difficulties surrounding the subject of emancipations depending upon the choice of slaves. Who are to choose for such as are of too tender years to choose for themselves? is a question which it is difficult to answer; at least, to give an answer which will apply to all cases, or even as a general rule. But these difficulties are not of themselves sufficient to prevent the court from administering the law, if it can possibly do so. They were overcome in *Elder v. Elder*, and may be, perhaps, in most cases. There is nothing to indicate that they cannot be overcome in this case, as they were in that. If in any case they cannot be overcome, the intention, of course, must fail of effect. But whenever they can, they ought to be overcome; *ut res magis valeat quam pereat*. Whenever the law authorizes an act to be done, and a party *bona fide* endeavor to do the act according to law, the court should endeavor to effectuate his intentions.

The will in this case was written in November 1835, two or three years after the decision of *Elder v. Elder*, and probably with that case before the draftsman, or in his mind. But for that case, the testator might have emancipated the slaves absolutely. He was willing to do so, but did not wish to force freedom upon them against their will, and therefore gave them their choice, as that case decided he might lawfully do. Ought we now to frustrate his will, and award the slaves unconditionally to those to whom he gave them only on condition that the slaves reject the boon of freedom which he offers them? I think not.

I am also of opinion that the increase of the slaves born during the life of the testator's wife, are entitled to the benefit of the bequest. All the residue of his property, including negroes, is loaned to the wife for life. The issue of these negroes born during her life, are part of his property and part of the negroes loaned to her for life. The choice of being emancipated or sold is given to "the negroes loaned his wife, at her death," embracing of course, I think, the said

issue. This construction seems to be sustained by many decisions of this court, which I need not cite.

I do not think that the clause directing his executor to sell any of the slaves loaned his wife, if they should prove refractory or hard to manage, affects the case in regard to such of the slaves as remained unsold at her death. This clause was inserted for the benefit of the wife, and to insure the good conduct of the slaves. Any of them might have been sold for misconduct during her life, and such would of course have been excluded from the number of those to whom the choice was to be offered at her death. But as to those who then remained unsold, the clause had performed its function, and they stood as if it had not been inserted in the will.

In regard to the other questions involved in this case, I concur with the majority of the court.

INJUNCTION. DEED OF TRUST. MORTGAGE. NOTICE.

Lineberry v. Dobyns, &c.

Circuit Court of Carroll County, Va. In Vacation. January 11, 1859.

A deed is drawn, conveying land to a trustee to secure debts, in the form prescribed by the Code of Virginia, in sec. 5, ch. 117, p. 504, and containing no special covenants: this is a deed of trust and not a mortgage, and the trustee may proceed to sell the land without application to a court of equity.

Notice is given, to the plaintiff in an injunction, of a motion to dissolve at a place thirty miles from his residence. The notice is served on the 5th day of January; the motion is made on the 11th: *Held*, the notice is reasonable and sufficient.

A notice is served by a constable and returned in his official capacity: *held*, a good service under sec. 1, ch. 167, p. 639 of the Code.

An answer to an injunction is filed on the 3rd January and a motion made to dissolve on the 11th, the plaintiff and his counsel have not seen the answer, the clerk having sent the papers to the place where the motion is to be heard: this is no reason for refusing to dissolve, the plaintiff not alleging that he had sustained any injury in consequence of not seeing the answer.

Quære: Whether a person *non compos mentis* may sustain a bill in chancery in his own name, or whether he must not proceed by his next friend or committee.

In 1855 *Jeremiah Lineberry* executed a deed, conveying a

tract of land in Carroll county, to *Ben. W. Dobyys*, in trust to secure debts due to *S. & T. M. Dobyys*. The deed was in exact conformity to the form given in the 5th section of ch. 117 of the Code, p. 504. There were no special covenants. The debts were recited to be all then due.

In December 1858, the trustee advertised the land for sale, for cash. Thereupon *Lineberry* applied to Judge *Fulton* for an injunction to prohibit the sale, alleging in his bill that he was a man of weak mind, incapable of transacting his own business or protecting his own interests: that when the deed was made he did not understand and was incapable of understanding its force and effect: that he did not know that it would operate directly upon his property: that he did not intend to give the trustee any power to sell his land, and would not have made the deed if he had known or believed that it would give such power: that he was advised that the deed did not give any such power to the trustee, but that in the absence of any special covenant or agreement to that effect, the instrument was a mere mortgage, and that the land would only be sold under a decree of a court of equity, to be made in a suit to foreclose the mortgage: and it was further alledged that the land was worth far more than the debts, and the creditors were forcing a sale for cash, intending to buy in the land at a sacrifice. The bill was not sworn to by complainant himself, but by another person.

On the 3d January 1859, (the return day of the process,) *S. & T. M. Dobyys* appeared; demurred to the bill, and also filed their answer. They denied all the allegations of the bill: stated that they did not want the land, but their money: that the plaintiff was a man of ordinary intelligence and good sense; of mature age; father of a large family, which he supported by his own exertions; the owner of good property which he had always managed for himself, and with ordinary prudence and success; that the assertion of imbecility on his part was a mere pretext for delay, and a thing never before heard: that he was responsible for all his acts, and had made this deed with a full understanding of its force and effect; and that the debts were just and correct, which, indeed, was not denied in the bill. They contended that the deed was a deed of trust in proper form and required no intervention of a court of equity.

On filing the answer, the defendants gave notice that they would move to dissolve the injunction at Wytheville, on the 11th of January. The clerk, not wishing to go to Wytheville with the papers, sent them by the defendant's counsel, taking his receipt. Plaintiff's counsel resided at Hillsville, (the county seat of Carroll) and did not see the papers after the answer was filed, until Monday the 10th of January, when he came to Wythe

court, and got the papers from the defendant's counsel. Plaintiff resided in Carroll—about twelve miles from Hillsville, and thirty from Wytheville. The notice of dissolution was served on the plaintiff on the 5th of January, by a constable, who endorsed it "executed by leaving a copy at Lineberry's house. *C. L. Hanks, C. C. C.*"

The motion to dissolve came on to be heard at the time and place mentioned in the notice.

Tipton for the plaintiff objected to the hearing of the motion at this time on three grounds :

1st.—That the notice was insufficient. There ought to have been at least ten days' notice. That is the general rule, and though the statute directs this motion to be heard on "reasonable notice," we contend that six days is not such reasonable notice. Plaintiff living twelve miles from his counsel, and thirty from the place of trial, has not had a sufficient opportunity to confer with his counsel and get ready for trial.

2d.—The notice has not been properly served. *Hanks* is neither a sheriff nor sergeant, and the statute, sec. 1, ch. 167, p. 639 of the Code, requires the return of any other person to be verified by affidavit.

3d.—By the course adopted in this case we have been deprived of an opportunity to learn the character of the defence, and to prepare for trial. As soon as the answer was filed the clerk handed the papers to Mr. *Cook*, who brought them away and we did not and could not see them till yesterday.

Cook, for the defendants, was heard in answer to the objections, and submitted that the statute specifies only "reasonable notice," that the provision for ten days' notice is applicable only to motions for judgments or decrees for money : that complainant has not suggested that he has been injured by any of the matters objected to by him : that he does not allege any surprise, or that he would have strengthened his case in any mode, even if he had seen the answer, or had much longer notice : that the notice has been executed by a sworn officer, and at any rate the objection is not well founded when it appears that the notice has had its proper effect by bringing the plaintiff's counsel to the hearing of the motion.

FULTON, J.

I do not think that either of the reasons advanced would justify me in refusing now to entertain this motion. No time is fixed for the notice. It is sufficient if it afford the party a reasonable chance to make any preparation necessary to meet the motion. I think this notice affords that opportunity. If the plaintiff wanted to see his counsel, he was within three hours' ride.

If he wanted to take any depositions the defendants live in his immediate neighbourhood. He suggests no injury done him by the alleged shortness of time between service of notice and the motion.

The same remark applies to the complaint that he, or rather his counsel, had no opportunity to examine the answer. It is not pretended that any injury was done him in this respect. If the answer were a long and complicated document; if it related to a number of obscure and complex transactions; if there had been much room to doubt the grounds of defence, there might be something in the objection. But after seeing it, Mr. *Tipton* is not able to point out anything wherein he or his client has been put at a disadvantage by failing to see the answer. If it appeared that the answer called for any action on the plaintiff's part, which would not otherwise have been required, and that he had failed to take such action only in consequence of not having seen the answer, then I would not take up the case. But nothing of that sort appears. The answer imposes no such new burden upon him. It is a simple denial of the allegations of his bill. It was his duty to have taken evidence in support of those allegations (if he had any) as soon as the injunction was granted. He had ample time for this: more than three weeks before the answer was filed, and a week afterwards; yet nothing was done, and I cannot therefore see any force in the objection.

As to the service of the notice. I am compelled to overrule this objection also. Mr. *Hanks*, it is true, is not a sheriff; but he is a sworn officer. His return is made under oath; and I think such a service is within the spirit and meaning of the statute in relation to notices. Even if I held this an insufficient service, it is doubtful whether it would avail the plaintiff anything. Whether well or ill-served, this notice has brought him here by his counsel; and it would not be proper to turn the defendant away, because an act may not be properly shown to have been done when the very object of that act has been attained.

Proceeding to consider the motion upon its merits, I find all the allegations of the bill denied in the answer, and no evidence to sustain them. I have then no course to take except to dissolve the injunction, unless the plaintiff be correct in his contention that this instrument is a mortgage and not a deed of trust. I cannot hold it a mortgage. It is in the precise form directed by the statute for a deed of trust to secure debts. It is true that the form directs the insertion "of covenants or any other provisions the parties may agree upon," and the plaintiff contends that there ought to be stipulations as to the time of payment of the debts, the mode and terms of sale, &c.: and that the omission of such provisions renders the deed void as a deed

of trust, and makes it only a mortgage. But suppose there were no covenants. Are we to compel the parties to insert something in the nature of covenants, even though none were made between them? I am not to make a contract for these parties. If any particular agreement had been made it would be my duty to enforce it: but in the absence of such an agreement, I must presume that the statutory provisions were adopted in place of any special agreement. The statute gives a general form for these instruments, and then furnishes directions for carrying them into operation; and those directions are to be pursued in the absence of a special agreement. I think this is a good statutory trust deed, and that it must be carried into effect in the mode directed by the statute, and must therefore dissolve this injunction.

I have said nothing in relation to the question as to whether the complainant could maintain this action if he were, as he alleges, of non-sane mind. In the view of the matter which I have taken it is unnecessary to decide that question, as the allegation of imbecility of mind is denied, and is not supported by any proof.

Injunction dissolved.

EVIDENCE. ENTRY. SURVEYOR.

Scott v. Hale and others.

Circuit Court of Grayson County, Va. September Term, 1858.

In an action against a county surveyor for failing to survey an entry of land, though the relator must satisfy the jury that he was the holder of a legal land warrant, and that the same was duly located; there is no particular mode of proof by which those facts are to be made out; but the relator may establish them by the surveyor's receipt, or by his admissions, or by any other testimony tending to prove the facts.

This was an action of debt in the name of the Commonwealth at the relation of *Peter Scott* against *Wm. B. Hale* and others. It was founded on the official bond of *Hale*, who was surveyor of Grayson county. The declaration set out the bond, with a condition for the faithful performance of *Hale's* duties as surveyor, and assigned two breaches. The first breach assigned was—that on the 18th day of February 1849, the relator made an entry of fifty acres of vacant and unappropriated land on Brush Creek in Grayson county, and that the defendant *Hale*, contrary to the

duty of his office of surveyor, failed to survey the same within two years, whereby the entry expired, and the relator lost the land. The second breach—that the relator made an entry of fifty acres of vacant land on Brush Creek, on the 13th day of February 1849, and the said entry having expired by the lapse of two years without a survey, the relator, as he lawfully might do, on the 13th day of February 1851, *renewed* that entry for two years; but that the defendant failed, neglected and refused to survey the said entry and location within the space of two years from the renewal, after which time the land was entered by another person who obtained a patent for the land, which was thereby wholly lost to the relator. Plea—*conditions per-formed*.

Cook for the plaintiff.

McCamant for the defendant.

The plaintiff read the following receipt: "February 13, 1849. Received of *Peter Scott* two dollars, fifty cents, pay for an entry of fifty acres of land on Brush Creek—also pay for the land warrant for the same. *Wm. B. Hale, S. G. C.*" At the foot of which was this additional receipt: "February 13th, 1851. Received of *Peter Scott* fifty cents for renewing the above entry. *Wm. B. Hale, S. G. C.*"

He then proved that prior to the 13th of February 1853, and within two years after the renewal of the entry, he applied to the defendant to survey the land and give him the usual certificate of survey, and the defendant promised that his deputy should make the survey. In this conversation defendant admitted that the relator had a warrant and had made an entry. Also that he sent to the defendant a similar request, and defendant told the messenger that he had directed his deputy to make the survey. Also that another person applied to the defendant to enter the land, but was told that it was *Scott's* land, and that he could not get it, without buying *Scott's* right. This witness saw a statement of *Scott's* entry on a small memorandum book and took a copy of it, but it was never properly placed on the entry book; which it was defendant's duty to have done. Plaintiff also proved that after February 13, 1853. one *Darnell* entered the land—had it surveyed and obtained a patent; but it turned out that it contained only 23 acres, worth \$4 50 per acre.

Upon this testimony *McCamant* asked this instruction: "unless the jury shall believe from the evidence that the relator *produced* to the surveyor a legal land warrant—*lodged* the same with him, and *directed* him to enter and locate it upon the land, in due form, they ought to find for the defendants. He referred

to the case of *Hale v. Crow and Wife*, 9 Grat. 263, and to the 6th and 7th sections of ch. 112 of the Code, p. 480. He contended that the relator must show himself to have been the *holder* of the warrant, when he made his entry; and that he must *have made the location* himself—that is, that he must have directed the entry to be made in terms so special and precise, as to enable other holders of warrant to locate any adjacent *residuum*. All this he contended to be incumbent upon the relator, and that unless it was shown he must fail.

Cook combatted this view, and contended that the defendant was *estopped*, by his receipts and admissions, to deny that the relator had a good warrant, and that it was duly located. It did not appear necessary to show those facts—or if it were necessary they might be inferred from his acts and declarations. *Hale v. Crow* was not in point, for that was *assumpsit* against the surveyor for not *furnishing land warrant and making the entry*, which the court held he was not bound to do; but here he admits that both these things had been done.

FULKERSON, J., (sitting for Judge FULTON.)

This is not an action for failing or refusing to make an *entry*. The declaration alleges that the entry was made and afterwards legally renewed, and the *gravamen* of the charge is that the defendant failed to survey that entry, and return the plat and certificate to the land office. That charge cannot be sustained, however, without proof of the entry; and that entry could not have been legally made without a land warrant. No entry is good without a warrant; and the jury must be satisfied that the relator had such warrant before they can find for the plaintiff. But there is no peculiar mode of proving that fact. It may be proved as any other fact, by the act or admission of the defendant. His receipt or his declaration is sufficient, if satisfactory to the jury.

Nor is necessary that the relator should have superintended the manual act of recording the entry in the proper book. He had only to place his warrant (whether he procured it from defendant or elsewhere,) in the defendant's hands, and describe the land on which it was to be located, and it was defendant's duty to record the entry. I can therefore only give the instruction with the modifications I have suggested.

The jury found for the plaintiff and assessed the damages at \$103 59, the value of the 23 acres.

McCament moved for a new trial on the ground that there was no evidence that the relator had any warrant, or had properly located it.

FULKERSON, J.

I think the jury well justified in inferring from the receipt and other evidence that the relator was the holder of a land warrant—that the entry was duly made, and that he left the warrant in defendant's hands, as the law directs.

Motion overruled and judgment for plaintiff.

INTERROGATORIES. USURY. EVIDENCE.

Walters v. Creger and others.

Circuit Court of Wythe County, Va. October Term 1858.

The court will not compel the plaintiff to answer interrogatories filed in an action at law, to discover *usury* in the debt sued for. If the defendant wish such discovery he must seek it in the mode and upon the terms prescribed in the statute against usury.

Quære: Whether answers to interrogatories, filed in a civil action, could be used in evidence against the party answering, in an action for a penalty.

Debt upon a single bill for \$250. Plea—*usury*—charged in the general form permitted by sec. 6 of the statute against usury, p. 576 of the Code. The defendants filed interrogatories to the plaintiff, tending to discover the usury, and requiring him to disclose all the facts connected with the contract. The plaintiff refused to answer, and the cause now came up on the motion of the defendants to compel the plaintiff to answer, or to dismiss his suit.

Leftwich, for the plaintiff.

Cook, for the defendants.

Leftwich submitted :

1st. That the case of a plea of usury is not within the operation of the statute permitting interrogatories to be filed in "a case at law;" Code, ch. 176, sec. 38, p. 667; because there is a special provision made for the case. Sec. 7, ch. 141, p. 577, (the statute against usury) enables the borrower to exhibit a bill for discovery of the usury; and if more than lawful interest was reserved the lender shall receive his principal money without interest, and pay all costs. He contended that the law did not intend to enable the borrower to escape from the whole debt,

unless he could establish the usury independent of any discovery from the lender.

2d. That the answers to these interrogatories, if they disclosed usury, would subject the plaintiff to an action, founded on the 11th section of the same chapter, for double the amount of unlawful interest taken, which action might be brought by any informer.

Cook, in his reply to the first objection, contended that there is nothing to distinguish the plea of usury from any other legal defence. The language of the statute is general—"in a case at law." Interrogatories are substituted for the bill for discovery whenever the party chooses to file them. They can only be filed when the court perceives that they are such as the party would be obliged to answer upon a bill for discovery. The bill of discovery here spoken of is the bill for discovery *purely*; the bill in aid of a defence at law: not the bill for discovery *and relief*, which is the one provided for in the statute against usury. As the interrogatories must in all cases, assimilate themselves to a bill for discovery, it can be no objection to their exhibition in a particular case, that such a bill is expressly allowed by statute. Nor is it a good objection that these interrogatories, if answered in the affirmative, will deprive the plaintiff of his whole debt. That is only what might happen in any case where the party answered in the way the other side desired. The object of all interrogatories and of all defences is to defeat the adversary.

As to the second objection, he contended that an action for the penalty could only be a *quidam* action, in which the parties would be different—for the Commonwealth at least would be interested—and then upon familiar principles these answers could not be read, for they would fall within the principle of *res inter alios acta*. But the statute, ch. 200, sec. 22, p. 752, seems to settle any such question. It enacts that upon a prosecution for crime, or in an action upon a penal statute, no statement made by a witness in a legal examination shall be given in evidence against him. The literal wording of this act embraces only witnesses; but its spirit and purpose extend to the parties when legally examined. It is the legal examination which necessitates and limits the protection.

FULKERSON, J.

I do not feel it necessary to decide the question raised by the plaintiff's last objection; but if required so to do, the inclination of my mind is that that objection could not be sustained; but I shall proceed to the other question.

Our statute concerning interrogatories is very broad and comprehensive; permitting them to be filed "in a case at law,"

without qualification or exception. This is a case at law; and at the first blush it would seem imperative upon the court either to compel the plaintiff to answer, or dismiss his suit. In the terms of the statute no allusion is made to usury, nor is there anything manifesting the legislative intention that matters of a usurious character should not be elicited by means of interrogatories.

But the General Assembly appears to have intended to treat this matter of usury as a *whole*. The chapter 141 is devoted entirely to the subject of interest, legal and illegal. All the liabilities, incident to usury, are defined, and the remedies for enforcing those liabilities are provided; and I think the legislation embodied in that chapter is intended to be exclusive.

By the 7th section of that chapter it is enacted that the borrower of money or other thing may exhibit a bill in equity against the lender, and compel him to discover, upon oath, the money really lent, and all bargains or shifts relative to such loan; and if it appear that more than lawful interest was reserved, the lender shall recover only his *principal money without interest*, and shall pay the costs of suit. The object of this enactment is to induce the usurer to disclose the truth of the transaction, by authorizing him to regain his principal, which he could not do if there were a verdict in a suit at law, establishing the usury.

If usury be made out in a suit at law the whole debt is forfeited. The usurer in such case can recover nothing. The borrower, of course, is at liberty to make out this defence, when sued at law for the usurious debt, by any legal evidence at his command. But I think this must be done without any appeal to the conscience of the usurer. When his conscience is appealed to, the law has seen proper to diminish the danger of perjury by the removal of, at least, a part of the temptation to false swearing. It imposes upon the usurer, as a punishment for his covetousness, the loss of all interest and the heavy costs of such a proceeding, but it restores the money which he actually advanced. It adopts the principle that he who seeks equity, must do equity, by repaying the money actually received: such is the price and the just price which it enacts for an appeal to the lender's conscience.

This purpose would be defeated by authorizing the borrower to extort an admission of usury from the lender by interrogatories in an action at law. If the answers admitted the usury they would be submitted to the jury, and would induce a verdict which would deprive the lender of his whole debt. This, I think, would defeat the manifest intent of the statute.

There is much force in the observation that the statute allow-

ing the interrogatories assimilates them to a bill for discovery, and makes such a bill the standard of the character of the interrogatories. It is doubtless true that the bill there mentioned is the *pure* bill for discovery, while the one contemplated by the statute against usury is a bill for discovery *and relief*. Still the latter is the mode expressly provided for the case of usury, and I cannot come to the conclusion that it is to be superseded by a bill for discovery *purely* in the guise of interrogatories. Interrogatories are only a substitute for the pure bill of discovery, and for that *only*; while the remedy provided in the chapter against usury is a bill for *discovery and relief both*.

It cannot be denied that something of conflict is apparent between these two provisions. But the one is general, the other special; and I understand the rule to be that when the terms of a general statute is broad enough to embrace a particular subject, but there is also a special statute exclusively devoted to that subject, and the two should come into conflict, the general must give way to the special. Such, I think, is the case here, and I must therefore sustain the plaintiff's objection, on the first ground; and require no answers to these interrogatories.

The case was continued till next term for trial.

BOOK NOTICES.

DEVEREUX'S BLACKSTONE. *The Most Material Parts of Blackstone's Commentaries Reduced to Questions and Answers.* By JOHN C. DEVEREUX, Counsellor at Law. Upon the Plan and in Place of Kinne's Blackstone. New York: Published by Lewis & Blood, 84 Nassau Street. 1858. [J. W. Randolph, Richmond.]

Mr. Devereux has prefixed to his work a very entertaining and tasteful preface, which may agreeably relieve the student, when he tires of the text. We have little fancy for abridgments or condensations—yet it is unquestionably true, that the plan of question and answer has some advantages in stimulating thought, and suggesting to the tyro what is chiefly worthy of attention. If there can be a substitute for the original, the present work affords it. We do not understand, however, that this is the design of the author. He wishes simply to help to the study of the commentaries themselves; and if the book be used only for this, it will be found useful—indeed, of great advantage to the student. Kinne's book has been so used for very many years: and this has the advantage of Kinne, because it is not so condensed, and its writer has availed himself freely of the labors of his predecessor. The book is well printed. It ought to sell.

COBB ON SLAVERY. *An Inquiry into the Law of Negro Slavery in the United States of America.* To which is prefixed an historical sketch of Slavery by THOMAS R. R. COBB, of Georgia. Vol. I. Philadelphia: T. & J. W. Johnson & Co. Savannah: W. Thorne Williams. [Richmond: A. Morris.] 1858.

This first effort to systematise the law of slavery, prepared by a Southerner, and published with all the recommendations of clear type, tasteful binding and good paper, ought to meet with encouragement from the Southern bar. The table of cases cited, and their names indicate the extent of the researches made by the author in the preparation of his volume. His historical sketch comprises upwards of two hundred pages, and treats of slavery among the Jews, Slavery in Egypt, in India, in the East, in Greece, among the Romans, in Europe, in the Middle Ages, in Great Britain, and of negro slavery and the slave trade, &c., &c. A glance at this sketch (and we have only been able to glance at it) has satisfied us that it will supply an important desideratum for the intelligent and useful discussion of this topic. The authorities from which our author has drawn are numerous and well selected.

The text of the work thus far treats of the following subjects :

- Chap. 1.—What is slavery ; and its foundation in the natural law.
- Chap. 2.—Negro slavery viewed in the light of Divine Revelation.
- Chap. 3.—Of the origin and sources of slavery in America.
- Chap. 4.—Of the slave as a person—The rights of personal security.
- Chap. 5.—Same subject continued.
- Chap. 6.—Personal liberty, and herein of fugitive slaves.
- Chap. 7.—Slaves escaping or carried into other States—Personal statutes as applied to slaves.
- Chap. 8.—Same subject continued, and examined in the light of the opinions of foreign jurists.
- Chap. 9.—Same subject continued, and decisions of foreign judicial tribunals examined.
- Chap. 10.—Same subject continued—How far the question is affected by our form of government and Constitution.
- Chap. 11.—Same subject continued—Decisions of our own Courts examined.
- Chap. 12.—Same subject continued—Fugitive slaves, and of the right of the master to remove the slave.
- Chap. 13.—Of the privilege of a slave to be a witness.
- Chap. 14.—Of the right of private property as applied to slaves.
- Chap. 15.—Of contracts by slaves, and herein of marriage.
- Chap. 16.—Of suits for freedom.
- Chap. 17.—Of other disabilities of slaves.
- Chap. 18.—Of offences committed by slaves.
- Chap. 19.—Of manumission, and herein of direct manumission by deed.
- Chap. 20.—Of manumission by will or executory contract.
- Chap. 21.—Of indirect manumission.
- Chap. 22.—Of the effect of manumission, and herein of the status of free persons of color.

We hope the author will be encouraged by the kind reception of his first volume to give us the second in a short time.

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No. 2.

RIGHT OF WAY. EJECTMENT. POSSESSION.

City of Richmond v. Warwick & Barksdale.

This cause came on to be heard before the Mayor of the City of Richmond on a summons against the defendant to answer for obstructing a public street in said City, by fencing in a portion thereof.

It appeared that the defendant had recovered, in an action of ejectment, that portion of the street which he had enclosed.

The opinion which follows was prepared by a learned and eminent member of the bar of Richmond, and adopted by the Mayor. [Ed.]

The summons in this case was returned before me on Monday, the 3rd instant, but the case not heard till Wednesday, the 5th. On that day, the evidence having been heard, left no doubt on my mind, whatever, that the street in question, had for many years been dedicated to the public, and that the right of passage over it, by all the people of this Commonwealth, at their pleasure, was thereby secured to them, no matter in whom was the title to the land originally, or is. But it being objected by the counsel for the defendant, that if any such right had ever been acquired by the public, it had been taken away by a judgment in ejectment against this city, I took until the next day to examine and consider of the arguments and authorities submitted by the counsel. Respect, both for the counsel and the authority of the Supreme Court of the United States required this, to say nothing of the importance of the question. Upon the most thorough examination and mature reflection, I am decidedly of opinion that there is nothing in the objection; that the obstruction complained of was a violation of an ordinance of the city; that for the first day on which it was placed

in the street, the defendants should be fined \$10, and for every day thereafter, during its continuance, \$20. It is proper here to remark that in reference to this case, the question never was, and could not have been decided by, nor been judicially before the Court of Appeals, or any other Court, in Warwick against the City of Richmond in ejectment; that suit involved the right to the land which the city never disputed. My decision admits it, but sustains the right of way over it. It was my purpose to have reported the case with my opinion and the authorities cited for and against the right of way, but as a very able and learned friend has felt sufficient interest in the subject to induce him elaborately to review my action, and has kindly handed me the result, and they are the same taken by me, I submit them to you for publication, if you think proper.

JOSEPH MAYO, *Mayor*.

THE TWELFTH STREET OBSTRUCTION.

Messieurs Warwick & Barksdale are brought before the Mayor upon the charge that they maintain an unlawful obstruction at a certain place in the City of Richmond.

They confess that they maintain an obstruction at the place alleged, but deny that it is unlawful. On the contrary, they contend that therein they do but exercise a right of their own, because the *locus in quo* is their soil and freehold.

To this it is replied, that though the place is their soil and freehold, nevertheless in maintaining such obstruction thereon, they do not exercise a right of their own, but do violate a right of others, because their (Warwick's & Barksdale's) soil and freehold is, at that place, subject to what the civilians call a servitude, and the common lawyers call an easement, of a right of way over it for the use of the public; and an offer is made to prove by evidence that such servitude or easement does exist.

They rejoin, that no such evidence can be given, or, if given, avail, because they have recently recovered the precise spot in question by judgment of a court of competent jurisdiction; in an action of ejectment which they brought against the City of Richmond.

It is sur-rejoined, that that judgment does not in fact touch, and in the very nature of the proceeding cannot by possibility touch the point now in dispute, and concerning which, evidence is offered as aforesaid.

The question is, whether it does or does not? If the City of Richmond could have defended the action of ejectment, upon the ground of the servitude or easement now alleged, then (it may be admitted) that judgment would preclude the City from

afterwards asserting the existence of such an easement; it would, however, not preclude any *others* save only *such* as would claim under the right of the city. But if the city could *not* have so defended that action, then the judgment in it cannot preclude *any one*, not even the city, or persons claiming in right of the city, from asserting the right of way set up, with all the legal consequences of such right.

Now, nothing is clearer, upon both principle and authority, than that such a defence, if offered in the action of ejectment, would have been wholly inadmissible, and must have been accordingly ruled out without listening for a moment to any evidence which could have been offered in support of it. Had it been offered and confessed to be true; yet it could not have availed one whit more in that action than it would have done if it had been proved or admitted to be false. Consequently the judgment given in that action cannot have *any bearing upon the question* of its truth or falsehood.

1. Upon principle this must be so, because the action of ejectment asserts only a right to the soil and the possession thereof, which right, if the plaintiff has, he must recover thereon; and a right of way over the soil is not inconsistent with such possession. If it were, it must be because such right of way would carry with it the right of possession; but the latter of these rights does not draw with it the former, and, therefore, (1) whoever has no other right to be upon the ground, than what he derives from its being a highway, has no right to be there at all, except while he is using it for the legitimate purpose of a highway; and, therefore, if he stands upon it for the purpose of shooting game, he is just as much a trespasser, and in every way just as much answerable in that character, (of a trespasser,) as if he had gone for the same purpose into an enclosed field of the owner adjoining. 30 Eng. L. and E. Rep. 304; Reg v. Pratt, 4 Ellis and Black. 860, S. C. Other like illustrations, and several of them not less strong than this, abound in our books. And (2) ejectment cannot be maintained against the owner of the soil, by one having a right of way over it, for erecting upon the soil buildings which encroach upon the way so as not to leave sufficient room for passing—his remedy, (for he clearly has one) being in another form of proceeding. 1 D. Chipm. 204; Judd v. Leonard.

These authorities prove what would seem really clear enough without any, that in the case of an highway, where the very soil itself is not acquired by the public, as (to be sure) it may be, the owner of it retains his right of possession, and may have actual possession in any and every way that is compatible with its being used as an highway, and may keep off all intruders

who would use it for any purpose of another kind. And if he be dispossessed, that is to say, deprived of such possession as I have here described, he may maintain ejectment for it, and might have maintained a writ of right or other real action, till all such actions were abolished by our present Code. This will appear by the cases to be cited under the next head.

II. Upon authority, touching directly this point, if the owner of the soil bring his action of ejectment or his real action, (as under our old law,) the defendant cannot resist it by showing a right of way over the soil in any person whatever. (1.) Not by shewing that there is a highway over the place, for the use of all persons in general, as was decided in *Goodtitle v. Alker*, (1 Burr, 133; 1 Ld. Kenyon, 457;) and in numerous cases in this country, whereof I shall mention some in the sequel. (2.) Nor by showing that there is a right of way belonging peculiarly and exclusively to the defendant. 5 Metc. 446; *Hancock v. Wentworth*. In this case, Hubbard J., delivering the opinion of the court, used some expressions particularly applicable to the present enquiry: "The rights of the demandants to the fee in the demanded premises, and the right of the tenant [the technical name of the defendant in a real action] to an easement in them, are," said he, "rights independent of each other, and may well subsist together." "*A recovery, therefore, by the demandants will not affect or disturb the easement of the tenant (if he has one) in the premises.*" Consequently, whether the right of way over the *locus in quo* is to be regarded as belonging only to the city of Richmond in its corporate capacity, (that capacity wherein the action of ejectment was brought against the city,) or as belonging to the Commonwealth, or the public, the judgment in it cannot affect *either the right of way or the evidence* of such right.

It is true, that in the case of the City of Cincinnati, vs. White's Lessee, 6 Pet. S. C. Rep., 441—444, Thompson, J. delivering the opinion of the Supreme Court of the United States, attempted to discredit the decision in the leading case on this subject, of *Goodtitle vs. Alker*; but he succeeded only in discrediting himself and his associates. A few remarks will prove this:

I. He said, "the later authorities in England leave it at least questionable, whether the doctrine of Lord Mansfield, in the case of *Goodtitle vs. Alker*, 'that ejectment will lie by the owner of the soil, for land which is subject to a passage over it as the King's Highway,' would be sustained at the present day, at [in] Westminster Hall." Now, nothing, since the decision in that case, has ever fallen from any English Judge, or any English text-writer, that has ever conflict-

ed or tended to conflict with it. On the contrary, it has been universally recognized there, from the time of the decision being made down to the present moment, as absolutely indisputable, and as such, it is mentioned in all the books which have any occasion to touch upon this point. In all treatises upon the law of Nisi Prius (4 Buller, 6th edit., 99; Espinasse, 3d edit., 428; Selwyn, 11th edit., 703; Leigh, 826; Harrison & Edwards, 81; Stephens, 1392—1465; Archbold, vol. 2, p. 303;) in all treatises upon the action of ejectment, (Runnington, 3d. edit. 130, Adams, 18—19;) and in numerous other books of the very best credit; Saunders' Pl. and Ev., 2d. edit. 98; Woolrych on Ways, 5; 1 Crabb on Real Property, 101; 3 Thorn, 60; Litt., 210; 3 Bac. Abr., 19 edit., 1832. And though there has never since been there another decision to precisely the same point, that has been only because no person has there ever brought that point in question again.

The context of Judge Thompson's opinion shows, that by "the later authorities in England," to which he refers, he means, *Atkins vs. Horde*, 1 Burr., 119; (which was *before Goodtitle vs. Alker*;) *Doe vs. Staple*, 2 Durnf. and E., 684; and *Doe vs. Jackson*, 2 Dowl and Ryl., 523; which all only lay down the doctrine that the plaintiff in ejectment cannot recover, unless he has the right of possession. Possibly this doctrine may have seemed to Judge T. of modern origin, but it is really as old as the action of ejectment itself; and when *Goodtitle vs. Alker* was decided on the 28th of January, 1757, it could not have escaped the Judges, who had themselves, on the 25th of January, 1757, concurred in stating it so emphatically in the case of *Atkins vs. Horde*. In truth there is not even the slightest semblance of a collision between *that* doctrine and the doctrine solemnly settled by the same Court in less than half a week afterwards. If this is not already sufficiently manifest it shall be made more manifest presently.

2. He said, "it (the doctrine upon which the decision in *Goodtitle vs. Alker* proceeded,) was not even at that day considered a settled point; for the counsel in the argument referred to a case, said to have been decided by Lord Hardwicke, in which he held that no possession could be delivered of the soil of a highway, and therefore no ejectment would lie for it." Now, it is true, that *till Goodtitle vs. Alker* was decided, the point was not only not considered to be settled, but it was moreover positively considered to be not settled, no decision upon it having been ever reported in print, or authentically in manuscript, and therefore the point was in that case twice solemnly argued in banc, in order that a decision settling it might be made. And the great respect entertained

for Lord Hardwicke was what alone led Sir Michael Foster to have a special verdict found, in consequence of its being said that he (Lord Hardwicke,) had twenty years before laid down, at *Nisi Prius*, the doctrine above imputed to him. But when the matter came to be enquired into rigorously, no man could be found to own that he was the author of the report respecting that supposed opinion of Lord Hardwicke, or to say that he knew who was; and therefore, the Court all rejected, as unworthy of credit, both that statement, and also similar reports, that in one case, Mr. Justice John Powell, and in another, Lord Chief Baron Pargelly—two very great lawyers—had held precisely the reverse. They took up the point as if it were *res integra*, decided it purely upon principle, and decided it upon principle so well, that *thenceforward* there has never existed the slightest dispute or doubt about it in England.

3. He said, "This doctrine of Lord Mansfield has crept into most of our elementary treatises on the action of ejectment, and has, apparently, in some instances, been incidentally sanctioned by Judges. But we are not aware of its having been adopted in any other case, where it was the direct point in judgment. No such case was referred to on the argument, and none has fallen under our notice. There are, however, several cases in the Supreme Court of Errors of Connecticut, where the contrary doctrine has been asserted and sustained, by reasons much more satisfactory than those upon which the case in *Barrow* is made to rest; *Stiles vs. Curtis*, 4 Day, 328; *Peck vs. Smith*, 1 Conn. Rep. 103."—These are the very words of Mr. Peters' report, and they have never been publicly disavowed. We must, therefore, believe that they were uttered with the consent of all the Judges of the Supreme Court, by one of their number, in delivering what is called *their* opinion, painful as it is to believe so. For the paragraph contains more misrepresentations and blunders than it does sentences.

(1.) What is called "the doctrine of Lord Mansfield" was not his more than it was that of Sir Thomas Dennison and Sir Michael Foster, the other two Judges who sat in the case, (the fourth Judge being at the time absent in Chancery, as one of the Lord Commissioners of the Great Seal,) both very able men, at *that* time more skillful in common law learning than Lord Mansfield himself, and who delivered each in his turn his own opinion, with his own reasons. They had listened to two elaborate arguments, (one in 1755, and the other in 1757,) of which Lord Mansfield had heard only one, and each of the three was clear of any doubt whatever upon

this point. Why it should be said to have "crept into" the text-books since, I am at a loss to conjecture; it certainly did not *creep* into the world on that occasion. Perhaps it was intended to suggest that the text-writers had, without due caution, admitted it. I have given the names of several, and must submit to those who are competent to judge, whether they were less cautious or clear-sighted in a matter of this sort, than "this same learned Theban?"

2. If he meant, that the "sanction" incidentally given by judges to the same doctrine, had been in all cases *apparent* only, let me ask, by what form of expression could a *real* sanction be given, if not by such as the following? "When land is appropriated to the use of a highway, the use only is taken and, except so far as that goes, the right of soil remains precisely as it was before; so much so, that the owner of the soil may recover it in *ejectment*, subject, however, to the easement; and he has a right to the freehold, and all profits above and under ground, except only the right of passage." Sedgwick, J., 2 Mass. Reports, 127, *Commonwealth v. Peters*. "By the location of a way over the land of any person, the public have acquired an easement, which the owner of the land cannot lawfully extinguish or unreasonably interrupt. But the soil and freehold remain in the owner, although encumbered with a way; and every use to which the land may be applied, and all the profits which may be derived from it, consistently with the continuance of the easement, the owner can lawfully claim. He may maintain *ejectment* for the land thus encumbered; and, if the way be discontinued, he shall hold the land free from the encumbrance." Parsons, C. J., 6 Mass. Rep. 456, *Perly v. Chandler*. "I hold it to be clear, that the public [in the case of a highway] have no other right but that of passing and repassing, and that the title to the land and all the profit to be derived from it, consistently with, and subject to the right of way, remain in the owner of the soil. The owner may maintain trespass for any injury to the soil, which is not incidental to the right of passage, acquired by the people; the land covered by a highway, may be recovered in *ejectment*." Putnam J., 16 Mass. Rep. 34—*Stackpole v. Healy*. "It was once doubted whether *ejectment* or other real action would lie for the soil of a road or highway because it was said full seizen could not be delivered; and a *dictum* of Lord Hardwicke—[more correctly, as we have seen, one imputed to him upon no better, or little better authority than mere rumor,] was quoted to that effect in the case of *Goodlittle v. Alker et als.*, 1 Burr, 133; but that doubt was removed by the decision in that case; and very clearly it had no foundation in principle." Wilde, J., de-

delivering the opinion of the court, 6 Pick. 59, *Adams v. Emerson*. "When the sovereign imposes a public highway upon the land of an individual, the title of the former owner is not extinguished, but is so qualified that it can only be enjoyed subject to that easement. The former proprietor still retains his exclusive right in all mines, quarries, springs of water, timber, and earth, for every purpose not incompatible with the right of way. The person in whom the fee of the road is, may maintain trespass, or *ejectment*, or waste." Platt, J., delivering the opinion of the court, 15 Johns Rep. 453, *Jackson v. Hathaway*. All these *dicta* were prior, and the latest of them about five years prior, to that very remarkable utterance *ex cathedra* in the Supreme Court of the United States, on which I am here commenting. Others equally pointed might be produced, but I forbear.

(3.) Stranger even than all that precedes, is what I am now upon the point of introducing. Though the judges, who sat with Judge Thompson, and he himself, as he says, were "not aware" that the doctrine in question had been then adopted in any case but that of *Goodtitle v. Alker*, "where it was the direct point in judgment;" yet it *had* been so adopted in more cases than one. For example, in *Cooper v. Smith*, 9 Serg. & R. 26; in which *Duncan J.*, delivering the opinion of the Supreme Court of Pennsylvania, said—"The action of ejectment [which was the form of action in that case] is one of possession; and it is no bar to a recovery, that another possesses a right of way, or other easement, for the owner of the soil may maintain an ejectment for land over which a highway is laid out; because, though the public have a right to pass over it, yet the freehold and all the profits belong to the owner, and he may use it in any way not inconsistent with the public right or easement:" And afterwards, in conclusion—"It might have been sufficient to have decided this case on one ground, that, if the plaintiff in error had a right of easement, the only right which he claims, still the plaintiff below had the right to the soil and the possession; but [the court] have considered it proper to give an opinion on all the errors assigned." So, in *Pomeroy v. Mills*, 3 Vern. Rep., 279, which was indeed not the case of a highway, but (*exactly* like the case of the city of Cincinnati *v. White's lessee*.) the case of a public square, the owner of the soil recovered in ejectment, subject to the public easement. And although the form of action in *Alden v. Murdock*, 13 Mass. Rep., 256, was entry *sur disseisin*; and that in *Thompson v. The Proprietors of the Androscoggin Bridge*, 5 Greenl. 62, and in our own Virginia case of *Bolling v. The Mayor of Petersburg*, 3 Rand. 563, was writ of right; yet all

persons competent to judge *know* that those decisions are just as much authorities to this purpose, as if the form of action in them had been ejectment. Accordingly, Judge Carr, in his opinion in the case last cited, (wherein Judges Brooke, Cabell and Green concurred, Judge Coalter being absent,) relied mainly upon the case of *Godtitle v. Alker*, as showing that in England the action would be maintainable—and argued further to show, that the law was not in this respect altered in Virginia. And so Judge Lomax, in both editions of his Digest, (vol. 1, 1st edit. 534, 2d edit. 683,) citing that authority and some others, says—“The grant of a highway, or the laying out of a highway, gives to the public only the right of way. The fee, or right of soil, remains in the original owner. To him belongs the freehold, as well as the profits of the land, such as trees growing upon it, and mines under it. He has a right to all remedies [and *ejectment* is one] for the freehold, subject to the easement, and he may bring an action of trespass for any exclusive appropriations of the soil.” As the *dicta* cited under the last head, so these decisions were all prior to Mr. Justice Thompson’s dogmatical *prolatum*. I believe that there are several others subsequently, but I shall cite only one, viz: *Hill & Denio*, 308, *Browne v. Galley*. See also 3 Kent’s Comm., 1st edit. 348–9, 6th edit. 432–3.

(4.) Finally, (so far as relates to the paragraph I am now considering,) we are referred to two cases in the early Connecticut reports, with a statement that there are “several” such cases, as if there were more than these two, wherein a doctrine contrary to that of *Goodtitle v. Alker* has been “asserted and sustained” by reasons much more satisfactory than those upon which that case is “made to rest.” Now, in the first of these two cases, [*Stiles v. Curtis*, 4 Day, 328,] that contrary doctrine was advanced by only two judges out of eight that delivered their opinions, the other six declining to accede to it, and the ninth judge taking no part in the decision; and in the other, [*Peck v. Smith*, Conn. Rep. 103,] it was advanced by only one judge, while another [Swift, J.—afterwards C. J.] in that same case conclusively *demonstrated* the right to maintain ejectment, under such circumstances as form the subject of our present consideration. That I may not too tediously multiply repetitions, and because I shall, under the next head, use some of his reasons, I must refer to the book for his argument. Ever since it was delivered, the received doctrine of the Courts in that State has been in accordance with it. 5 Conn. Rep. 305, *Watrous v. Southworth*; 13 Conn. Rep. 309, *Wooster v. Butler*; 19 Conn. Rep. 182, *Reed v. Leeds*.

4. Mr. Justice Thompson said further, “if we look at the action of ejectment on principle, and enquire what is its object,

TRUST DEED, HELD NOT FRAUDULENT.

Purcell, Ladd & Co. et als. v. Margaretta Brooks et als.

Supreme Court of Appeals of Virginia. Spring Term, 1859.

A trust deed conveying property in general terms, without description, for the benefit of certain creditors, containing also a reservation that the grantor shall remain in peaceable and quiet possession and enjoyment of all the property, assets and effects for one year from date, until which time the trustee shall not proceed to execute the trust, not therefore fraudulent.

Nor will such deed be set aside, though it gives no description whatever of the creditors in the several classes made by said deed, by name, number, or amount of debts; nor although the deed requires that the creditors, to be benefitted thereby, shall, within sixty days, become parties to the same, and thereby release and surrender all claim against the grantor, except under the deed.

On the 30th of December, 1855, Margaretta Brooks, who was engaged in keeping the Columbian Hotel, and was possessed of certain slaves, and of other personal property, consisting of furniture, provisions, liquors, wood, coal, &c., finding herself much embarrassed, and having been sued by some of her creditors, after calling together her creditors and giving a statement of her situation, executed a deed of trust for the benefit of her creditors. The deed conveys to Wellington Goddin, trustee, "all the property, assets and effects of every description, in possession or in action, belonging to the partnership of Daniel Ward & Co.," (of which she was a member,) "and all property of every description, in possession or in action, belonging to the said Margaretta Brooks;" in trust for the following purposes: "First, to pay from the assets of the said concern, the partnership debts thereof, *pro rata*, among the partnership creditors. Secondly, from the proceeds of the property of the said Margaretta to settle her liabilities as follows:—first, to pay all debts and demands due by the said Margaretta individually for money advanced to her on loans, and to indemnify against loss any person who for accommodation may have drawn or endorsed any note as surety, may have signed any bond on account of and for the benefit of the said Margaretta individually—the debts in this class referred to, being exclusive of such liabilities as may attach to the said Margaretta as a member of the late firm of Daniel Ward & Co., and as a member of the more recent and still existing firm of James M. Boyd & Co., exclusive also of any balance which the said Margaretta may appear to owe any present or former partner, upon a settlement of partnership transactions. Secondly, to pay all other

debts and liabilities of the said Margaretta, including whatever balance may be due the estate of James M. Boyd, dec'd, upon a final settlement of partnership transactions, whether growing out of the business of that concern up to this time, or hereafter arising from the operations of the concern, up to the time that by contract it will expire, excepting one-third in amount of the debts due by the concern of Daniel Ward & Co. And thirdly, to pay one-third in amount of the debts due by Daniel Ward & Co., hereinbefore mentioned. It is hereby declared that the three classes of creditors of the said Margaretta, who are provided for, shall be preferred in the order in which they are named, and if the means provided are not sufficient to pay all the creditors in any named class, they shall share *pro rata*; but it is expressly hereby declared that no creditor of the said Margaretta Brooks, except as hereinafter provided, shall be entitled to the benefit of the provisions of this deed, who fails, within sixty days from the date of this deed, to surrender all claim to any other satisfaction of his debt than is hereby provided, and to release all other and further demands against her—such failures to surrender and release accruing to the benefit of such creditors as do so release and surrender; which release may be made by the creditors so releasing, becoming parties to this instrument, or in any other legal and sufficient manner. It is however provided hereby, that so much of what is hereinbefore contained as requires a release from creditors, shall not affect the estate of James M. Boyd, deceased. And it is further declared and provided, that the said Margaretta shall remain in the peaceable and quiet possession and enjoyment of all the property, assets and effects hereby conveyed or intended to be conveyed, for the space of one year from the date of this deed; after the expiration of which time, and not before, the trustee hereby appointed, or who may be hereafter appointed, may proceed to execute the trust according to the provisions of this deed."

This deed was signed by a portion of the creditors, others of them refusing to sign, and was admitted to record in the clerk's office of the hustings court at Richmond, on the 11th day of January, 1856.

In March, 1856, Purcell, Ladd & Co., and others of the judgment creditors of Mrs. Brooks, filed their bill in the circuit court of the city of Richmond, against the said Margaretta Brooks, the trustee in said deed, and the creditors who had signed it.

The bill alleges, that the said deed was made with intent

to hinder, delay and defraud creditors, and prays that it may be declared fraudulent and void—

1st. Because the power retained by the grantor, enables her to defeat the provisions of the deed.

2nd. Because the description of the property sought to be conveyed is vague, indefinite, and prevents any identification of it.

3rd. Because the defendant had sold property since the execution of said deed, embraced (if any property was conveyed by said deed) in said deed.

4th. Because the deed provides that the whole property of the grantor is placed beyond the reach of her creditors for one year, thereby hindering them from the enforcement of their debts; and further, because it provides that none except those who sign the said deed, and thereby relieve the said Brooks from any further liability, shall share the benefit of it.

5th. Because the deed seeks to convey the partnership assets of Daniel Ward & Co., the said Daniel Ward being still alive.

6th. Because the said deed does not definitely describe to whom the proceeds of the trust are to be paid.

Mrs. Brooks answered the bill, denying all fraud, and alleging that the provisions of the deed were the best that could be made for the benefit of the creditors.

Her answer states that the creditors were twice called together, and the provisions of the deed read over to them, and as she was informed, no public objection was made to it by any one.

The answers of the other defendants are not material.

The evidence in the cause consisted of the extracts of plaintiffs' judgments, executions and returns; the said deed, and the deposition of S. D. Crenshaw, who proved that he was the owner of the Columbian Hotel Tavern, which was kept by Mrs. Brooks and her partners; that she owned the whole or a part of the furniture and stock in the tavern, at the date of the deed, also some slaves, under deed of trust. He also proved that Mrs. Brooks sold her interest, or a portion of it, in the stock and furniture in the tavern to one Lee, who went into partnership with her in January, 1856; that three negroes of Mrs. Brooks' had been distrained and sold for rent since the execution of the deed; that the creditors had been assembled on two occasions, and been notified of Mrs. Brooks' situation, and heard the deed read, and that no objection was made, except by the representative of one of the creditors; that he understood at the meeting of the credi-

tors, that the reason why Mrs. Brooks wished to carry on the business for a year longer was, that there was a lease between herself and the said Crenshaw for twelve months longer, and if she gave up the business on the 1st of January, 1856, she would still have to pay the rent of the house until the 1st of July, 1856, the amount of that rent being \$2,500.

Andrew Johnston and Crenshaw & Wellford, for the plaintiffs.

First. The property conveyed is not described at all, but is conveyed in the most vague and general terms, calculated to enable the grantor to dispose of the same, without the possibility of following and identifying it, or at least making such pursuit a work of great difficulty.

Second. That the deed contains this reservation—"the said Margaretta shall remain in the peaceable and quiet possession and enjoyment of all the property, assots and effects, hereby conveyed or intended to be conveyed, for the space of one year from the date of this deed, after the expiration of which time, *and not before*, the trustee hereby appointed, or who may be hereafter appointed, may proceed to execute the trust according to the provisions of this deed."

Third. That by the provisions above mentioned, the grantor reserved to herself, *unconditionally*, the possession, use and enjoyment of all her property, estimated at \$12,000, without any specification or description, for the space of *one year*, during which time, neither the trustee nor any creditor could interfere with or disturb her. The negroes and furniture being under deed of trust to special creditors, only the surplus, of their value, which the event proved to be very small, could be available to the creditors under this deed. While the stock on hand, the liquors, provisions, wood, coal, &c., which constituted the largest portion of the property, and which could only be used in the actual consumption thereof, was retained expressly under the absolute control of the grantor for the year.

The object of this reservation would have been plainly inferred from the nature of her business and the character of the property reserved. But it is admitted in her answer, and proved by the witness Crenshaw, that it was for the avowed purpose of enabling her to *continue her business*, which, in consequence of *her debts*, and of the *suits brought against her*, she could do no longer, unless the property were *protected from execution by a conveyance*. This absolute possession and control of property of this character is wholly irreconcilable

with any idea of an honest debt for the protection of creditors. If it be argued that the grantor *hoped* to make money by keeping the house open during the year, and *ultimately* to benefit her creditors thereby, the answer is obvious. She is forbidden by the law, not only to make a deed to *defraud*, but to make a deed that shall *hinder* or *delay* her creditors from taking her property for their debts. When she is insolvent, it is no longer *her* property but *theirs*. It is for them to say whether they will take what she has, so far as it will go or put it to *hazard*, in a new speculation. It is not for her to make the election for her creditors, and to force them to submit to the *delay* and the *risk*, and the attempt on her part is *a fraud*.

The principles laid down in the following cases are conclusive against the *bona fides* of this deed: *Lang v. Lee*, 3 Rand. 410, 422 to 427, 429 to 432; *Sheppards v. Turpin*, 3 Grat. 373; *Addington v. Eltheridge*, 12 Grat. 436 to 439.

The case at bar is still more obnoxious to the charge of fraud, than those we have referred to. In one of them the trustee might take possession, upon a default in payment of debts and upon a request of a majority of creditors.—In another the trustees might take possession whenever they saw fit. In the third the grantor was to account for what property he should sell, to the trustee. But in the present case, the grantor was to have *absolute*, unconditional possession and *use*, for one year, of things to be *consumed* in the *use* of them, and was to be accountable to nobody. She did in fact not only use and consume, but *sell* the property; and of \$2,600 worth of property sold; while the landlord got \$1,300 by his lien for rent, the other \$1,300 is not accounted for at all.

Even, however, if such an accounting had been provided for in the deed, and the business declared to be carried on for the benefit of the creditors, the deed could not be sustained, on that ground, against creditors who *do not consent to it*. Daniel, J. in *Sheppards v. Turpin*, 12 Grat., 398-'9; *Owen, &c., v. Body, &c.*, 5 Ad. & El., p. 28; 31 Eng. Ch. L. R., pp. 254 to 258. In this case it is decided, that the deed, providing for the conduct of the business, for the benefit of the creditors, would constitute them *partners*, that these were terms to which creditors were not bound to submit, and that as against those *who do not consent* the deed is invalid.

The same principle is decided in *Hickman v. Cox*, 9 J. Scott, 438; 86 Eng. C. L. R.; 36 Eng. L. & E. R., p. 400; 3 Rob. Practice, ed. 1838, p. 141.

A fourth objection to the deed is, that it gives no descrip-

tion whatever of the creditors in the several classes, by name, number, or amount of debts. It is insisted that the deed ought to be declared void for uncertainty, inasmuch as it neither ascertains the debts in the said classes, respectively, nor points out any means for their ascertainment.

The deed is also further objectionable, that it requires the creditors, within 60 days from the date, to become parties, and thereby release and surrender all claim against the grantor, except under the deed. Thus, while they have no information, and no means of learning the nature and value of the assets, nor the number and amount of the debts of the grantor; while the grantor retains absolute control of the property, and may dispose of it, and reserves the power of making her creditors as many and their debts as large as she thinks fit; her creditors are blindly required to give up all claims against her, without the opportunity of calculating whether they will ever get one farthing out of the trust.

The deeds requiring a release, which have been sustained, have been full and fair conveyances, giving up the whole property of the debtor, making no reservations inconsistent with their professed object, disclosing what was conveyed, describing the debts to be secured, and affording to creditors called upon to make an election, all the means of forming a deliberate judgment.

The case of *Skipwith v. Cunningham*, 8 Leigh, 271, which is the main reliance of the advocates of these release clauses, differs widely in these respects from the case at bar, and the distinction taken by Tucker J. at pp. 291-2, is fatal in its application to the *bona fides* of this case.

Crump, Howard and Sands, for debt.

There was certainly no actual fraud, nor intention of fraud. The whole conduct of the grantor shows it. The advertisement, the assembling of the creditors, the public reading of the deed, all show that she designed to act fairly and for the advantage of the creditors. She did what she was advised to do by the creditors themselves; those of them who were interested in making the property turn out to the best advantage. The retaining possession of the property for twelve months is alleged as an indicium of fraud. Is this true here? The landlord held the property bound for a year's rent. It was then January. The rent from January to July, when the year would expire, amounted to \$2,500. This rent would have to be paid whether the business was carried on or not, and to prevent the loss which would necessarily accrue, it

was determined to carry on the business, and the deed was executed.

Was this constructive fraud? The length of time that possession was to be retained by the grantor is relied on as in support of fraud. *Addington v. Etheridge*, 12 Grat., 436, is said to be conclusive authority. There the power granted in the deed to the grantor, who was a merchant, was to keep possession of and sell the stock of goods, in the usual line of his trade, until default was made in the payment of the debt secured. This was manifestly a provision inconsistent with the deed. It enabled the grantor to dispose of the subject of the deed, and sell it all out, thus leaving nothing for the creditors. The court properly held the power incompatible with the avowed purpose of the grantor, to furnish an indemnity to his creditors, that its terms were equivalent to a power of revocation, and enabled the grantor to defeat the provisions of the deed. Here there is no power to sell—to dispose of the subject; creditors were all apprised of the provisions of the deed before execution. The condition of the property was such, that the creditors were advantaged by the delay. The case of *Addington v. Etheridge* is like the case at bar in this particular only, that in each the grantor remains in possession. It is contended, however, that as in *Addington v. Etheridge*, the grantor could have consumed the whole trust subject. This is not so. If she had attempted to sell the negroes, the trustee could have enjoined. As to the furniture, a part of that was under previous lien, and all of it was liable for rent, and the trustee, Goddin, had the right to enjoin any sale of it by her. So with regard to all of the property embraced in the deed. In this respect, therefore, this case is distinguished from *Addington v. Etheridge*, from *Shephards v. Turpin*, 3 Grat., 373, and *Law v. Lee*, 3 Rand., 422. In *Law v. Lee*, the court say, “by the deed it is covenanted and agreed, that the said goods are to remain in said Lee’s possession, and he is empowered to make sale of them,” but is “to account with the trustee, if called on.” The case was one of gross fraud, and the court could not possibly escape the conclusion that the deed was fraudulent. There was *actual* fraud, and no necessity in that case to resort to the doctrine of constructive fraud.

So, in *Sheppards v. Turpin*, the power to dispose of the property was relied on by the court, and mainly relied on as the badge of fraud.

This distinction alone, *the absence of the authority to dispose of the property*, is enough to distinguish this case from all the cases cited by the counsel for the plaintiffs; and they will

look in vain for a case, where the court has held a deed fraudulent *per se*, in which this power of disposition is not expressly or by necessary implication reserved to the grantor.

The principle of the cases is clear. When a grantor has power to defeat the purposes of the deed, by disposing of the trust subject, the courts hold such a power inconsistent with the grant in the deed, and treat it as a nullity. Here there being no such clause in the deed, there must be proof of actual fraud, to vitiate the deed. This is not attempted. The doctrines of constructive fraud must be solely relied on in this case, by the plaintiffs, and if unavailing, they must release any claim to upset this deed.

Again: It would seem that the counsel for plaintiffs have mistaken the decision in *Addington v. Etheridge* in another particular. The deed there would have been unexceptionable, had the grantor retained possession, with the power of sale, up to the period of default in payment of the debt secured, provided that then his power of disposition ceased and the legal right of the trustee had attached, and the legal title vested in him and been divested from the grantor. The Court of Appeals pronounce the deed fraudulent, not because of the possession and power of sale without accountability until default, but because, *also*, they are retained after default, at the pleasure or caprice of a creditor secured by the deed, thus rendering the period of foreclosure indefinite, and fixing no time at which the power of sale by the grantor is divested. It might, therefore, well be said, that this was equivalent to a power of revocation.

But the plaintiffs treat the remaining in possession here as designed for Mrs. Brooks' benefit. The witness Crenshaw proves that it was for the benefit of the creditors—to save them the loss they must sustain, in paying a high rent for a tavern, unused.

The objections to the clause requiring a release are answered by *Skipwith v. Cunningham*, 8 Leigh, 272; *Brashear v. West*, 7 Pet. 615; *Heathcote v. Crookshanks*, 2 T. R. 24; *Lynn v. Breece*, 2 H. Black. 317.

It is further objected, that the deed does not specify the property and debts, and does not impose the terms of release upon all the parties.

The deed conveys *all the property*. Was there difficulty in identifying it? If there was; in the absence of the deed, would there have been less difficulty? It would require an unprincipled debtor to consummate a fraud here; but if the debtor be unprincipled, the fraud could be consummated with much more facility *without* the deed than with it.

There is only a single exception to the clause requiring a release. Boyd's estate is not required to release. What are the facts? Boyd had but recently died, and his executor but recently qualified; between Boyd's estate and the grantor there were unsettled partnership accounts, and there was yet an unexpired term of partnership. Acting in a representative character, the executor must, if he released, assume a responsibility which he ought not to assume. It would have been grossly unjust *not* to have made the exception.

The court is specially referred to the following cases:—*Cochran v. Paris*, 11 Grat. 343; *Dance v. Seaman*, 11 Grat. 778; *Kewan v. Branch*, 1 Grat. 274; *Lewis v. Caperton*, 8 Grat. 148; *Janney v. Barnes*, 11 Leigh, 100, and *Enders v. Glenn*, not reported, and decided by a divided court.

MEREDITH, J.

The court is of opinion that the deed of the defendant Margaretta Brooks, dated 30th day of December, 1855, attacked in the bill of the plaintiffs, was not made with the intent to hinder, delay or defraud her creditors, and that the same is not fraudulent and void, and the court would now proceed to dismiss the bill of the plaintiffs, if this were the only ground upon which this suit was instituted; but the court is also of opinion, that under the bill and proceedings in this suit, the plaintiffs therein, as well as any other creditors, are entitled to accounts showing the amount and value of the trust property conveyed, and also showing what disposition has been made of it by the trustee, Wellington Goddin. The court doth adjudge, order, &c., said account.

On the rendering of this decree, the plaintiffs petitioned the Court of Appeals for a writ of error, with supersedeas to the said decree. The Court refused the appeal.

CONTRACTS MADE ON SUNDAY.

Powhatan Steamboat Company v. The Appomattox Railroad Company.

In the District Court of the United States for the Eastern District of Virginia.
February, 1859.

A promise to do what is forbidden by law, or a promise made in consideration of an act done in violation of law, is void; and the infliction of a penalty for the doing of any act is an implied prohibition of it.

The statute against laboring on the Sabbath applies to corporations.

A common carrier is not responsible for the failure to deliver goods delivered to him on Sunday.

Macfarland & Roberts, Joynes, Tucker, Patton, for plaintiffs.

Robinson & Jones and Gholson, for defendants.

The plaintiffs offered in evidence a statute of the State of Maryland, incorporating them in the name of the Powhatan Steamboat Company, and further introduced evidence tending to prove, that for many years prior to the 26th day of June, 1853, they had run a weekly line of steamboats, for the transportation of goods and merchandise between the city of Baltimore and the city of Richmond, in the State of Virginia, which boats were accustomed on each trip to stop at City Point, on James river, for the purpose of landing goods and merchandise, destined for Petersburg, Virginia, and of receiving goods and merchandise sent from Petersburg. That the said goods and merchandise were conveyed between City Point and Petersburg in both directions, by means of a railroad between those places; that on the said 26th June, 1853, and for several years previously, the said railroad was the property of and operated by the defendants, a corporation created by the State of Virginia; that on the said 26th June, 1853, and during the whole period previously that the said railroad was owned and operated by the defendants, there was an arrangement and contract between the plaintiffs and defendants, for the transportation of goods and merchandise, by their respective lines of conveyance, between Baltimore aforesaid and Petersburg aforesaid; that under the provisions of the said arrangement and contract, goods and merchandise destined to be transported from Baltimore to Petersburg, were to be delivered in Baltimore to the plaintiffs, whose agent there was to give receipts therefor, promising to deliver such goods in Petersburg, and the said goods were to be carried by the plaintiffs upon their steamboats to City Point, and there delivered to the defendants, and by them transported on their railroad to Petersburg, and that the freights for the entire distance should be collected in Petersburg, by the agent of the plaintiffs, and one-fourth part thereof paid to the defendants; and that the plaintiffs and defendants entered upon the said course of transportation, and prosecuted the same regularly until the said 26th June, 1853; that according to the regular course of the transportation, one of the steamboats of the plaintiffs left Baltimore every Saturday, in the afternoon, and arrived at City Point at or shortly after noon on Sunday, and there, on the same day, delivered the goods and merchandise destined to Petersburg to the defendants, by depositing the same in

the warehouse of the defendants, located on the wharf at City Point, adjacent to the road of the defendants, the agent of the defendants opening the warehouse for the purpose of enabling the plaintiffs to deposit the said goods and merchandise therein, and closing the same after the said goods and merchandise had been so deposited—the whole labor of landing the goods and merchandise, and depositing them in the warehouse, except the opening and closing the warehouse, being performed by the plaintiffs. That according to the usual course of said transportation, such goods and merchandise remained in the said warehouse until Monday morning, when they were transported by the defendants to Petersburg, and the steamboat of the plaintiffs, after so delivering the goods to the defendants, proceeded on Sunday up the river to Richmond. That on Saturday, the 25th of June, 1853, one of the steamboats of the plaintiffs left Baltimore as usual, having on board goods and merchandise destined for and to be conveyed in said boat to Richmond, and having on board also, other goods and merchandise, destined for Petersburg, for which the said plaintiffs had given their receipts in Baltimore, to be delivered in Petersburg according to the contract and course of transportation aforesaid. That the said steamboat reached City Point about noon on Sunday, the 26th of June, 1853; that the agent of the defendants unlocked and opened the warehouse of the defendants to enable the plaintiffs to deposit therein the goods and merchandise destined for Petersburg, and that the plaintiffs on the same day landed the goods and merchandise destined for Petersburg and deposited them in the said warehouse, which was thereupon closed by the said agent of the defendants—the whole labor of landing and depositing the goods, except the opening and closing of the warehouse, being performed by the plaintiffs; and that the said steamboat proceeded up the river to Richmond on the same day, and as soon as the said goods and merchandise destined for Petersburg had been landed and delivered as aforesaid, all which were according to the usual course of the said business. That on the same day the said warehouse and all the goods and merchandise aforesaid were destroyed by fire; that actions were instituted by sundry parties owning the said goods and merchandise against the said plaintiffs, in the Circuit Court of Petersburg, to recover the value of the said goods and merchandise; that immediately after the institution of the said actions, the plaintiffs gave notice to the defendants of the institution and pendency thereof, and that in case the plaintiffs should be held liable therein for the said goods and merchandise, they

would claim reimbursement from the said defendants of the amount which they might be compelled to pay, and calling upon them to come in and defend the said actions; that the said actions were fully defended by the said plaintiffs, and verdicts and judgments rendered against them for the value of the said goods and merchandise, which said verdicts and judgments proceeded and were founded upon the ground of negligence and want of due care in the custody and preservation of the said goods and merchandise, in the warehouse aforesaid; that by the said verdicts and judgments the said plaintiffs were held liable for the sum of \$12,000 and upwards, and were compelled to pay and did pay the same, for the recovery of which from the defendants, the present action is brought.

And the plaintiffs further introduced evidence tending to prove that it was a part of the contract between plaintiffs and defendants, that in case the agent of the defendants should not be present at City Point, to open the warehouse, on the arrival of the steamboat on Sunday, the agents of the plaintiffs were authorized to open the said warehouse themselves, and deposit the said goods therein; that the usual time for the steamboat to leave Richmond on her return to Baltimore, was in the afternoon of Tuesday, and that it was necessary for her to leave at that time, so as to reach Baltimore in time to discharge her cargo and take in another, by the usual time of departure on Saturday; that unless the said boat reached Richmond by an early hour on Monday morning, it was necessary, to enable her to leave on Tuesday afternoon, that she should work all Monday night, in discharging and receiving cargo; and that such extra labor on Monday night would have required the plaintiffs to employ a larger force, and subjected them to largely increased expenditure; and that the distance between City Point and Richmond could be run by said boat in some four or five hours.

And it was proved that the President, Directors and stockholders of the plaintiffs' corporation are, and always heretofore have been citizens of the State of Maryland, and that the President and Directors of the defendants' corporation are, and have always heretofore been citizens of Virginia, and that the road and all the property of the defendants' corporation belong, and have always heretofore belonged to the city of Petersburg, in Virginia.

The defendants, to sustain the issue on their part, introduced evidence to prove, that though the plaintiffs delivered the goods from their boat into the warehouse of the defen-

dants, on Sunday, the 26th day of June, 1853, and had been in the habit of doing so, on previous Sundays, they were allowed to do so only for the convenience and accommodation of the plaintiff, and upon an understanding and agreement between the said plaintiffs and defendants, that the said goods should, until Monday morning, be at the risk of the plaintiffs, the said defendants not doing any work on Sunday. And thereupon the defendants, by their counsel, moved the court to instruct the jury as follows:

“If the jury believe from the evidence, that at the time of the fire in the declaration mentioned, the plaintiffs and defendants were engaged in the business of carrying goods and merchandise between Baltimore and Petersburg, in two steamboats, which plied between Baltimore and Richmond, conveying the goods and merchandise to City Point, and there delivering the same to the defendants, who carried them thence to Petersburg, over their railroad, and that in the usual course of transportation, the plaintiffs delivered from one of their steamers to the defendants at City Point, on Sunday of each week, the goods and merchandise which had been brought in the same from Baltimore, and was to be carried by the defendants from City Point to Petersburg, and that in accordance with that usage, the plaintiffs who had carried the goods and merchandise in the declaration mentioned from Baltimore to City Point in their transit to Petersburg, delivered the same to the defendants on Sunday, the day of June, 1853, on Sabbath day, and that the said goods and merchandise were burned on the same day, Sunday, June , 1853, that they must find for the defendants.”

HALLYBURTON, J.

The question for the decision of the court in this case is, whether the Railroad Company are liable, as common carriers, for the loss of goods delivered to them and accepted by them as such carriers, on a Sunday, to be carried by them on the following day, from City Point to Petersburg, which goods, while in the warehouse or depot of the Railroad Company, were consumed by fire on the day on which they were delivered.

It is too well settled as a principle of the common law, to require discussion, that a promise to do what is forbidden by law, or a promise made in consideration of an act done in violation of law, is void; and it seems to be now equally well settled, that the infliction of a penalty for the doing of any act, is an implied prohibition of it.

The rule is stated by Holt, Chief Justice, *Bartlett v. Viner*, Carthew, 252, in the following words, quoted by Tindal, C. J., in *De Begnis v. Armistead*, 10 Bingham, 107: "Every contract made for or about any matter or thing which is prohibited and made unlawful by statute, is a void contract; though the statute does not mention that it shall be void, but only inflicts a penalty on the offender; because a penalty implies a prohibition, though there are no prohibitory words in the statute;" and it is said in *Cope v. Rowland*, 2 Mee. & W., 149, to be "*perfectly settled*, that where the contract which the plaintiff seeks to enforce, be it express or *implied*, is, expressly or by *implication*, forbidden by the common or statute law, no court will lend its assistance to give it effect;" and that "it is *equally clear*, that a contract is void, if prohibited by a statute, though the statute inflicts a penalty only, because such penalty implies a prohibition.

The general principle above laid down, has also been sanctioned by the Supreme Court of the United States, in the cases of *Armstrong vs. Toler*, 11 Wheat., 258; *Groves vs. Slaughter*, 15 Peters; and *Harris vs. Runnels*, 12 Howard, 80; and a great number of cases, both in England and the United States, have decided that contracts and agreements to do what is forbidden by the statutes enacted for the purpose of enforcing the observance of the Sabbath, and contracts made in consideration of acts done in violation of those laws, are utterly void.

The statute of Virginia, in relation to labor on Sunday, to be found in the Code of Virginia, 1849, pp. 740-1, is in the following words:

"If a free person on a Sabbath day be found laboring at any trade or calling, or employ his apprentices, servants or slaves in labor, or other business, except in household or other work of necessity or charity, he shall forfeit two dollars for each offence; every day any servant, apprentice or slave is so employed, constituting a distinct offence.

"No forfeiture shall be incurred under the preceding section for transportation on Sunday of the mail, or passengers, or their baggage. And the said forfeiture shall not be incurred by any person who conscientiously believes that the seventh day of the week ought to be observed as a Sabbath, and actually refrains from all secular business and labor on that day, provided that he does not compel a slave, apprentice or servant, not of his belief, to do similar work or business on Sunday, and does not on that day disturb any other person."

And the court has now to inquire whether such a contract

as that to which we have above referred, between the Steamboat and Railroad Companies, is annulled by the statute above recited or not.

That for one carrier to deliver goods to another, to whom by his contract he is bound so to deliver them, is to labor in his calling, is clear. It is said, however, that the parties to this suit are incorporated companies, and that our act of assembly does not apply to corporations, nor to *vessels* engaged in the carrying trade between different states of the Union; and moreover, if it did, that such a delivery of goods as has been supposed, is a work of necessity within the meaning of the act; but we have a statute which expressly declares, that "the word person may extend and be applied to bodies politic and corporate, as well as individuals;" and without referring to that, I have no doubt that the legislature intended to prohibit corporations, which are only associations of individuals, as well as to prohibit individual persons, from engaging in their ordinary business on the Sabbath.

It will not be seriously affirmed that our Banks may open their doors, and discount notes, and carry on their usual business on Sundays, without any breach of the law; or that our railroad companies may lawfully receive, and carry and deliver merchandise on Sundays, as on the other days of the week.

As to steamboats and other vessels engaged in commerce between the states, or between the United States and foreign countries; although the power to regulate such commerce be conferred upon companies exclusively, by the federal constitution, yet the police regulations of the several states have never been held to be prohibited by that instrument; and the law in relation to the observance of the Sabbath is merely a regulation of the police. It was intended solely to promote good order, and morality and religion, and not at all as a commercial regulation, though like many other police regulations, it may indirectly effect commerce to some extent.

Besides, the delivery of the goods and the receipt of them, in the case supposed, were acts done upon the land; and if it were conceded that the statute of Virginia was not meant to be applied to ships, while under weigh upon any bay or navigable river; or to meddle with anything done on board of them within the admiralty and maritime jurisdiction of the United States, and before they have reached the shore; it would by no means follow, that it would not be applicable to acts, such as we have mentioned, done on land.

Many cogent, and perhaps conclusive reasons may be given why a vessel, coming in from sea, or that may be pursuing,

on Sunday, a voyage previously commenced, and when the labor of arresting her progress might be "as tedious" as going on, should not be required to come to anchor, as soon as she enters the limits of a state; and why the statute should not be held to apply to such a case; which would not be at all applicable to the case before the court.

The delivery of the goods may be justified, by necessity; but what is a work of necessity within the meaning of the act of assembly? For what end and purpose must the act be necessary, in order to be lawful?

What is necessary for any purpose whatever, may, in that point of view, be regarded as a work of necessity; but the question recurs, whether it be necessary to an end which the law sanctions, and which is not attainable in any other way; and for the attainment of which it may be fairly concluded, that the law intended that labor might be done on Sunday.

It might be very important to a merchant, so far as profit was concerned, that he should expose to sale on Monday goods, which he had received on Saturday; and in order that he should be able to do so, it might be *absolutely necessary* that he should work on Sunday in opening and arranging them; but could he lawfully do so? Would that be the sort of necessity which the law contemplates?

It might be of much pecuniary benefit to a farmer that he should ship a load of wheat, and send it to market, by a vessel which was to sail on Monday morning, and to accomplish that end it might be indispensibly necessary that the wheat should be winnowed and prepared for market on Sunday, but would that be a work of necessity in contemplation of law?

If, on the other hand, it be lawful to carry on commerce with foreign countries, it must also be lawful that seamen should work on Sunday, in crossing the ocean; because otherwise, such commerce could not possibly be carried on. Sunday labor is indispensable to the attainment of that end; and if the end be clearly a lawful one, the means must be so too. This would be true, even if our act extended over the ocean, which it does not.

The charters and laws by which banks are created, and which permit the business of banking to be carried on, and large amounts of money to be deposited and kept constantly in them, allow, by necessary implication, that a watch may be kept on Sundays, as well as on other days, to guard the property of the banks, and of those who deal with them; as it could not be fairly and reasonably supposed, that the legislature intended that such property should be left unprotected; but they may not transact their ordinary business on Sun-

day, because that is not necessary to the end for which they were established.

A person may lawfully employ a servant in driving his carriage, in order to convey his family to church on Sunday; because it would be unreasonable so to construe a law intended for the advancement of religion and morality, in such a way as to hinder the performance of religious duties.

So, if a house take fire, the owner may extinguish it on Sunday, though the labor of doing so may be very great and fatiguing, because such labor cannot be in conflict with any rule of morality or religion, or any object which the law may be supposed to have had in view, and it is a work of necessity, since it must be done at once, or not at all.

A common carrier too, who may be obliged, in the course of a long journey, to retain in his possession, on Sunday, goods which have been entrusted to him, may certainly watch over them himself, and employ others in doing so, on that day; but to travel with them, and deliver them out of his custody, on the Sabbath, though it may be convenient, is not a matter of necessity, in any sense, unless on an emergency, when it might be necessary for their safety to remove them; as, if the ships containing them were to take fire, or be in a sinking condition.

If a steamer might deliver her cargo to the owners, or deposit it in a warehouse at City Point on Sunday, in order that she might not be delayed in her voyage to Richmond, why might not the same steamer, and every other vessel that might arrive in the harbor of Richmond, and not have time to deliver her cargo sooner, unlade or continue the work of unloading on Sunday, in order that she might begin her return voyage on Monday? And if so, might not merchants receive the goods on that day, and send drays to convey them; and Sunday thus be made, instead of a day of rest, a day of as much business as any other day in the week?

This consequence appears to me to follow irresistibly.

The inconvenience of delaying steamers and other vessels, may, in a commercial point of view, be very considerable; but the merchant, the mechanic, the farmer, and men of business of all sorts, may sustain great loss and inconvenience from not being permitted to engage in their usual occupations on Sunday.

The results of a general suspension of labor throughout the land on every seventh day are immense; the diminution of the products of labor in that way, may be enormous, but these results were, in the contemplation of the legislatures of

the states, and the due observance of the Sabbath, thought to be an object worth them all.

It has been argued, further, that if the labor of delivering the goods were unlawful, the mere receipt of them and acceptance of their delivery by the Railroad Company was not a labor, in violation of law.

The answer to this argument is, in the first place, that in the case supposed, it forms a part of the contract that the goods shall be delivered and received on Sunday, and the carrier who, in pursuance of such agreement, merely unlocks his warehouse and allows the merchandise to be deposited there, and locks them up, is aiding and abetting another in doing an unlawful act, as much as one who watches whilst a burglar is breaking a house, and his contract to do so, and keep them afterwards, is therefore unlawful and void, even if his acts be not regarded as labor in his calling.

Another answer is, that to be obliged to be present when the goods were delivered, and unlock the door, and remain until they were deposited in the warehouse, or return to lock the door, might be a very disagreeable and troublesome labor, requiring much time, and depriving the person who performed it of all the advantages of the Sabbath.

And thirdly, it may be answered, that if the law allow a person to enter into a binding agreement to receive and keep goods on a Sunday, and *makes him responsible as carrier for neglecting to keep them safely*, it certainly must be lawful for him to protect himself from loss, not only by locking the door of his warehouse, but by taking an inventory of the goods delivered, and employing persons to guard them, and do all other acts which may be necessary to ensure their safety; in other words, to labor in his calling on the Sabbath.

Therefore, while I refuse to give the instructions asked for in the precise language in which they are written, I instruct the jury as follows:

"The court instructs the jury, that if they shall be satisfied by the evidence in this cause, that the plaintiffs and defendants were common carriers at the time of delivery and acceptance of the goods hereinafter mentioned; and that said goods were brought to City Point by the Powhatan Steamboat Company, or their lawful agents, as carriers, and were so delivered by them to the Appomattox Railroad Company, or their agents, and accepted by them as common carriers; and that said Railroad Company unlocked their warehouse at City Point, in order that the goods might be stored therein, and afterwards locked them in, under a contract or understanding, express or implied, between said companies, that

said goods were to be so delivered by the said Steamboat Company, and accepted and to be conveyed on the following day by the said Railroad Company, as common carriers as aforesaid from City Point to Petersburg, and that said goods, after having been so deposited in said warehouse, and while remaining therein, were destroyed by fire, through the negligence and want of care of said Railroad Company, or its agents; yet, if they shall be further satisfied by the evidence that said goods were so delivered and accepted on a Sunday, under a contract, express or implied as aforesaid, that they might be so delivered, and would be so received and accepted on that day, between the said companies, or their lawful agents, and were destroyed by fire on the day they were so delivered and received, to wit: on Sunday, the 26th June, 1853, then the jury should find for the defendants."

INTERROGATORIES.

Cox, &c. v. Cox, &c.

Circuit Court of Grayson Co., Va. Sept. Term, 1858.

Interrogatories must not be unreasonably delayed. Issue being joined at one term, it is unreasonable delay to wait until the next term to file interrogatories, and the court will not compel an answer.

Interrogatories cannot be filed by one of the parties to the other, to be used upon the trial of an issue, *devisavit vel non*. The parties have had a sufficient opportunity, upon the bill and answer, to probe the consciences of their adversaries.

A *non-suit* cannot be suffered on the trial of an issue out of chancery. The successful party is entitled to a verdict.

At July term, 1856, of the County Court of Grayson, a paper purporting to be the will of *John Cox*, was admitted to probate. Some time afterwards, *Terrill Cox*, a son of the decedent, exhibited his bill in the Circuit Court, alleging, that the paper so admitted to probate was not his father's will, but was executed when he was *non compos mentis*, and under improper influences; and making the other children and heirs of *John Cox* defendants to his bill, he prayed that a proper issue might be joined and tried, and the paper set aside, and the decedent declared to have died intestate. Some of the defendants answered the bill, averring that the paper was the will of *John Cox*, duly executed, without any

undue influence; and they joined in the prayer for an issue to try the validity of the instrument. At the April term last, an issue was ordered, and was duly drawn up and joined between the parties, to ascertain whether the instrument was the will of *John Cox*.

The issue coming on at this term, when it was called for trial, the plaintiff *T. Cox* presented certain interrogatories to two of the defendants, *A. and B. Cox*, relative to the mental condition of *John Cox*, at the time the alleged will was executed. Both these defendants had answered the bill, and had asserted in their answers that the testator was of sound mind, and the will properly executed.

McCamant & Brown, for plaintiff.

Floyd & Cook, for defendants.

The defendants objected to any answer, on the grounds—first, that the interrogatories had been unreasonably delayed; and second, that they could not be required to answer interrogatories in such a case as this. The proceeding by way of interrogatories is, in express terms, confined to actions *at law*, in which one party has no other mode of reaching his adversary's conscience. Here the party has had such opportunity, by means of our answer to his bill, where we have answered to matters of a like nature to those mentioned in the interrogatories.

FULKERSON, J. (holding the court for Judge *Fulton*.)

In the first place, I think these interrogatories have not been filed in time. The court can, by the provisions of the statute, compel an answer only when it "sees that the interrogatories have not been unreasonably delayed." Issue was joined in this cause at the last term, five months ago; yet the party has waited till this time, and shows no cause for such delay. I cannot therefore require the other party to answer.

But there is another sufficient answer to this application. Our statute allowing interrogatories to be filed is, in my opinion, confined to actions at law. Such is its very language. The difficulty was, that at common law there was no mode by which one party could compel the other to disclose any facts within his knowledge. To remedy this evil our statute was enacted, requiring either party in an action at law, to answer any interrogatories relevant to the cause, and filed in due time. But no such necessity existed in proceedings in equity. There each party always had ample

means to compel the other to make any proper disclosures. This is in substance, a proceeding in equity, though according to the directions of the statute, an issue has been made up to be tried by a jury. The persons who are now required to make disclosures have already answered the bill; and if their answers were not sufficiently full and definite, the plaintiff ought to have amended his bill, and required more distinct replies to his enquiries, or have applied to the court to compel a more satisfactory answer. On either ground, I must sustain the objection.

A jury having been empannelled, the paper was exhibited by the defendants, (who were plaintiffs in the issue.) Its execution was proven by the two attesting witnesses, who both swore that the testator was perfectly sane and competent when he made the will. Many other witnesses also deposed to the condition of the testator—all tending strongly to sustain the validity of the instrument. Some testimony was introduced on the other side, to impeach the will; but scarcely even tending to effect that purpose. After examining two or three witnesses, *McCamant*, saying that they had been taken by surprise by the refusal of the court to compel the other party to answer the interrogatories, asked leave to suffer a *non-suit*.

FULKERSON, J.

I do not think this proposition admissible. In an ordinary suit at law, the plaintiff may suffer a non-suit at any time before the jury leaves the bar. But this is not a suit at law. It is a proceeding in equity, in which it has become necessary to ascertain a particular fact. That enquiry is made for the information of the court—not for the especial benefit of the party who commenced the suit. The court is entitled to that information as its guide in disposing of the chancery suit—whether it suit the views and wishes of the plaintiff or not. He has no control over this issue: it is under the supervision and management, so to say, of the court itself. And the other party is entitled to the benefit of this proceeding, by reason of its effect upon the suit in equity, in which he has become involved by the act of the plaintiff. I do not see how anything like a non-suit can occur upon this trial.

The jury then found a verdict, affirming the validity of the will, and on the next day the bill was dismissed with costs.

GAMING. PUBLIC HOUSE.

Commonwealth v. Chaffin.

Circuit Court of Wythe Co., Va. October, 1858.

Two instances of gaming at a private house are not sufficient to make such house a *public place* in legal contemplation.

The owner of a private house keeps liquor for sale, and sells it, without having any license, and permits persons to resort to his house to buy and drink spirits, such house is thereby made a *public place* in the sense of the statute against gaming, and card playing at such house is unlawful.

This was an indictment against *Omega Chaffin*, charging him with unlawful gaming, "by playing at cards at his own house in Wythe county, the same being a public place." The jury found the defendant guilty, and there was a motion for a new trial, on the ground that the verdict was contrary to the evidence. The facts of the case, and the grounds of the judgment, sufficiently appear from the opinion of the court.

Kent, Commonwealth's Attorney.

McCamant & Davis, for the defendant.

FULKERSON, J. (sitting for Judge *Fulton*.)

There is no dispute as to the facts of this case. It appears that the defendant and some other persons played cards at his house; and that some time previous to this playing the defendants had played at the same place, with another set of persons. It is unlawful to play cards at *any public place*,—Code, ch. 198, sec. 4, page 743. It is not unlawful to gamble at a *private place*, unless twenty dollars be lost or won in the course of twenty-four hours.—Section 5 of same chapter. The private residence of a citizen is not a public place, and gaming at such residence is not forbidden, except when it reaches the prohibited amount. But it has long been held that a private place may be converted into a public place, by the *habitual resort* to such place, *for the purpose* of gaming; and if it appeared that persons habitually resorted to this house for this purpose, the playing proved upon the defendant would be unlawful. But I do not think that such habitual resort is proved. It appears that gaming had occurred at this house only once before the occasion for which this defendant is indicted. The place was not public *per se*, like an ordinary; nor do I think that a single prior instance of gaming is sufficient to bring it within the operation of the decisions, converting private into public places on account of re-

sort thereto ; and if there were no other facts I should set aside the verdict. See Vandine's case, 6th Grat., 689.

But other important facts do appear. It is proved that the defendant kept ardent spirits for sale, though he had no license so to do, and permitted all persons who chose so to do, to come to his house, where he sold liquor to them, and permitted them to drink it on the premises ; and the proof is, that the house was much resorted to for that purpose. It is true that in so doing the defendant violated another and a different penal law, under which he might be prosecuted, and in fact he was yesterday convicted and fined for selling spirits contrary to law. This, however, does not affect the present question. The defendant may have violated, and I think has violated both laws. That he has committed one breach of law while engaged in another course of systematic disregard of a different statute, is very apparent. Under this indictment he could not be punished for selling liquor without license ; but by so selling he may have caused persons to assemble at the place of sale in such numbers and at such times as to constitute it a public place in the sense of the statute against gaming.

What is a public place ? I understand it to be a place to which all persons may resort at their will and pleasure—either by reason of the inherent character of the place itself, as in the case of an ordinary, a courthouse, or any other such place ; or by reason of the permission or invitation given to all persons, by the act of the proprietor, as in the instance of a storehouse during business hours, a public sale, and places of the like kind. Now I would compare the defendant's house to a store. The proprietor opens his house for a particular purpose, and invites all to come who desire to procure the thing sold. Does it lie in *his* mouth to say that it is not a public place ? Suppose a merchant should open a store, and commence selling goods, and invite or permit customers to attend, yet fail to procure his license, so that in fact his business is unlawfully conducted ; could it be tolerated, that either he or any one else should say that his store would not be a public place during business hours ? Would not gaming at such a place, under such circumstances, be a flagrant breach of law ? I do not think it can be doubted ; nor do I see any substantial difference between such a case and the one at bar. At the most, if any other person could be allowed to raise such a question, it is not open to the defendant. He at least should be held to the consequences of his own conduct. I must overrule the motion for a new trial.

Judgment for the fine fixed by law.

TENANT BY THE CURTESY.

It was well observed by a great judge,* that dower is a legal, an equitable, and a moral right, but that "the husband, on the contrary, has no right to a tenancy by the curtesy, but from positive institutions or provisions of the laws;" and that therefore it is "properly styled† a tenancy by the curtesy of England, that is, an estate by favor of the law of England." From which it follows, that it must be taken precisely as the law gives it, and no otherwise.

Now by the English law, as it existed at the foundation of these colonies, since United States, and for a long time before—and as it has continued ever since—a husband cannot, in any case, be tenant by the curtesy of his wife's *land*, unless he, in her right, has been actually or virtually seised of it‡ in deed, at some time during the coverture. It was decided by the supreme court of New York, in the case of *Jackson v. Sellick*,|| that this doctrine did not extend to what in America are called, almost technically, *wild lands*; and that decision has probably governed the action of individuals and courts in all cases of a like kind, which have since arisen.§ It has also been decided in the same state,¶ that the doctrine does not apply where the title of the wife is acquired by a conveyance, which under the statute of uses, passes the legal title and seisin to the grantee, without the necessity of an entry or other act, on her part, to perfect her estate; and probably this too will be a governing decision.** But with these qualifications, if the latter be a qualification, grafted upon it, the English rule has been held to be the law of New York,†† Rhode Island,‡‡ Kentucky,||| and probably other states.§§

*Sir Joseph Jekyll, 2 P. Wms. 703, in *Banks v. Sutton*.

†2 Woodaes. Vin. Lect. 18.

‡In accurate technical phraseology, this is a seisin in the husband and wife (as one person,) in right of the wife. See 1 Doug. 320, *Pollybank v. Hawkins*; 16 Pick. 161, *Melvin v. Proprietors of Locks and Canals on Merrimack River*.

||8 Johns. Rep. 262.

§See 1 Pet. S. C. Rep. 506, *Davis v. Mason*; 17 Pet. S. C. Rep. 68, 69, *Mercer's lessee v. Selden*; 1 How. S. C. Rep. 37, S. C.*

¶3 Hill 182, *Adair v. Lott*.

**See Tuck. Comm., B. 2. p. 58, edit. 1836.

††5 Cow. 74, *Jackson v. Johnson*; 8 Paige, 643, *Ellsworth v. Cook*.

‡‡1 Summ. 263, *Stoddard v. Gibbs*. |||| 6 Monr. 179, *Adams v. Logan*.†

§§ See McLean, 476, *Barr's lessee v. Gibbon's adm'r*.

*3 Humph. 267, *McCorry v. King*; 7 B. Monr. 402, *Vanersdale v. Fauntleroy's heirs*.
†7 B. Monr. 401, *Vanersdale v. Fauntleroy's heirs*.

In the recent case of *Mercer's lessee v. Selden*,* the supreme court of the United States decided, that the same rule yet prevails in Virginia. But as *the point is one of great practical importance*, it may be worth while to inquire, whether it was so held upon sufficient deliberation.

Judge Tucker (in his Commentaries on the Laws of Virginia†) makes no doubt of it; and such has been the general, perhaps it may be safely said, the universal opinion of the profession within the state. But Judge Swift (in his system of the Laws of Connecticut,‡) made just as little doubt that such was the law of that state; and so it is said to have been held there, in two cases that were decided in the superior court.¶ Yet it is perfectly settled, by subsequent adjudications, that the law of that state is, and at the time of Judge Swift's composing his work, was, exactly the reverse; and what is more, it was so settled with the concurrence of Judge Swift himself.

The first of these decisions was made by the supreme court of errors, in the case of *Bush v. Bradley*,§ the grounds of which will appear in the following extract from the opinion delivered by Judge Reeve; in reciting which, I have thought it expedient to introduce some observations upon the agreement and disagreement of the Virginia law with that of Connecticut, upon certain points of the latter, as stated by him.

"As to the point respecting the curtesy (said he,) there is no question but what there must have been, by the English law, an actual seisin of the wife, of the premises, during the coverture, to entitle the husband to the curtesy. It is said, that unnecessary departures from the common law of England are not to be favored—that by such means, every thing is rendered uncertain. I am fully of opinion, that few maxims of our law are more important than that of *stare decisis*; but it must be acknowledged by all, that our system of law respecting real property is, in many instances, very different from the English system.¶ We have in some instances, where we have adopted the principles of the English law, extended them to cases which, by the adjudications of the English courts, have not been supposed to fall within the governing principle; in others we have adopted entirely different principles: and in all such cases where this has been done, which are *p ri ratiōne* with those already settled, if we reject our own and

*17 Pet. S. C. Rep. 61; S. C. 1 How. S. C. Rep. 37.

†B. 2, p. 57. ‡Vol. 1, p. 252. ¶See 4. Day 301. §Ib. 298.

¶See Wythe's Rep. 2nd edit App. p. 374, n. 46

adopt their's, we shall mar the symmetry of our law; and the preservation of symmetry in our system, I also view as a most important consideration. In England, it is not sufficient that a man is proprietor of real property and has a perfect right to it when he dies, to cause it to descend to his heirs at law. No: he must be [*read* have been] actually seised thereof. The maxim is *seisina facit stipitem*, and the person that is heir to that property will be heir to him that was last seised. If A. should die, who owns Whiteacre, which descended to him from his father, but has not been actually seised, leaving a brother of the half-blood, B., and a sister, C., of the whole-blood, this estate cannot descend to C. his sister, and [*his*] heir—for B. being of the half-blood, cannot by their law inherit to his brother; but yet the same will descend to B., who is heir to his father, who was the last seised. Had A. been seised, the estate would have descended to C. The maxim of *seisina facit stipitem*, is an unyielding maxim of their law, and what governs the descent of property. But this is not our law. It is settled [in this state,] that it shall descend to the heirs of him who owns the property, whether he was seised or not. [And so it is in Virginia, by *statute*.*] Seisin directs the descent with them; ownership with us. By the English law, a devise will not operate upon real property, of which the devisor is disseised. Seisin is an indispensable requisite to give effect to the devise. A devise by our law [and also by the *statute* law of Virginia†] is good, although a man is disseised. Seisin is necessary in their law; and nothing but ownership in our law. We have always considered ownership of real property sufficient to maintain an action of trespass against every intruder; but by the English law, actual possession by entry is necessary. [In this respect the law of Virginia being unaffected by *statutory* provision, agrees with the English law.‡] We have always considered ownership as giving a right to possession of real property, as much so as ownership of personal property. Ownership in the one case draws after it the possession as much as in the other case; and whenever a right of possession is lost, all title and ownership is lost. So the statute of limitations respecting lands, has been construed. The statute, in the words of it, does not take from the original proprietor his title; it only tolls his right of entry; and yet this statute has been always considered as barring all claim of title, whilst the same words in the English statute have been considered not

*1 Lom. Dig. 594. †3 Lom. Dig. 20.

‡6 Rand. 8 Cooke v. Thornton; id. 556, Truss v. Old.

as having any effect on the title, but only on the right of entry, and the lands may be recovered by a form of proceeding proper for such a case. [In this respect also, the law of Virginia, agrees with that of England.*] The English law distinguishes betwixt a right of possession and a right of property, but our law does not. Wherever there is a right to real property, there is of course [in Connecticut] a right of possession, and the statute, which takes away the right of possession, takes away the right of property; and this is the reason, that this statute has received a construction altogether different from the construction given to the English statute. And this is perfectly analogous to every other case of real property in this state. Wherever you find a right of property, you find a right of possession, and all the consequences of ownership attending it, that you find in England, where there is an actual seisin; and, on the other hand, where there is no right of possession, there is no ownership. So in this case, Mary Goldear had title to the land, and though not actually seised, her husband acquired the same rights on her death, as if she had been seised. Since seisin is not necessary in case of descent to the heirs, neither is it necessary to pass lands by a devise,—why should it be thought necessary to the husband's title by the curtesy? The decision of the court in this case is no departure from fixed rules and precedents. The English rule respecting the efficacy of seisin, has long since been departed from; and to adhere to it in this case, would mar the symmetry of our law."

In this opinion, Mitchell c. j., and Swift, Trumbull, Baldwin, J. C. Smith and N. Smith, justices, concurred. Brainerd and Edmond, justices, without assigning their reasons, dissented; but the decision of the majority has been followed and confirmed in the subsequent case of *Kline v. Beebe*.† And no doubt, by these determinations and the long acquiescence under and conformity to them, the law has become so perfectly settled in that state, that it would be wrong to disturb it again: For this is one of those points, in regard to which it matters little how the law is settled, provided it be settled; while it is of very great importance, that it should not be fluctuating. But since it had been understood to be otherwise prior to the decision of the supreme court of errors in the case of *Bush v. Bradley*, and that former opinion had been made the basis of judicial action in some cases, the reasons which have been quoted seem scarcely sufficient to justify the determination which was founded upon them; and

*1 Lom. Dig. 619-621.

†6 Conn. Rep. 494.

especially to judge Swift, they should have appeared inadequate, after he had himself, in the work before mentioned, pointed out, in some very sensible remarks, the exceedingly *whimsical* nature of this estate by the curtesy. It is founded (says he,) "upon a singular principle, the capacity of the parents to have children, and the circumstance of their being born alive. It would be more rational to say, that the husband should hold, during life, the lands of the wife after her death, whether they had issue or not—or, that he should hold them, in case the issue survived her, and it was necessary to have the improvement of the lands for their education and support: But that the circumstance that the child be born alive, whether it live one moment or not, should be the event on which the estate depends, is one of those unaccountable whims, which are sometimes adopted by accident, and continued by the authority of precedent. It is still more extraordinary, that the husband should be defeated of the estate, if the child be delivered by the *cæsarean* operation: for there is precisely the same reason, why the father should have the estate of the mother for the education of children delivered by this mode, as the common mode."* And the effect of these reflections would have been heightened by attending to the extract from St. Germain, with which I shall close the present discussion.

From what has been said it is plain, that although the decision of the supreme court of errors may have been necessary towards preserving the "symmetry" (if in this respect it is worth preserving) of the law of Connecticut, yet such a decision neither is necessary to that end, nor would accomplish it, in Virginia; and therefore *the reasoning upon which that decision was founded, would certainly not justify a similar decision in the latter state.* But the learned counsel for the successful party in the case of *Bush v. Bradley*, did not put the argument on any such ground. According to the printed report, they said: "We lay down this proposition, that the husband is tenant by the curtesy of all the estate which any issue born of the wife during the coverture, would be capable of inheriting"—the very point which, was necessary for them to *prove*;† and in support of it they argued as follows: *The only reason why seisin is necessary by the English law, is, that the issue may be capable of inheriting*; it being a

*1 Swift's Syst. 253.

†In one sense, the proposition is sustained by ample authority, which it would be easy, and might seem pedantic, to quote; but, in the only sense in which it could be of any service to the counsel, it was a proposition that required proof.

rule of that law, that no one can be heir to the ancestor of any land, whereof the ancestor was not actually seised. 1 Cruise's Dig. 113. If, then, the issue can inherit without seisin in the ancestor, such seisin is unnecessary in order to constitute a tenancy by the curtesy. But it has been solemnly decided by this court, in the case of *Hillhouse v. Chester*, 3 Day 166, that seisin is unnecessary in order to transmit an estate by descent." *Ergo*, the conclusion. And if the first position in their argument be true, then the last being so both in Connecticut and in Virginia, the conclusion seems to be inevitable, that in neither of those states can actual seisin during the coverture, be a necessary prerequisite to the title of tenant by the curtesy—*unless* this case be out of the operation of the maxim, *cessante ratione legis unica cessat et ipsa lex*.

In a note, which will be presently cited from Lomax's Digest, the able author of it seems to think that the case is a fit one for the application of the maxim; and his opinion is entitled certainly to very great respect. But it rather seems to me that the maxim has been heretofore used only to indicate, not when an acknowledged rule of law shall cease absolutely and become extinct, but how far, while it exists, it shall extend, and in what cases it shall take effect. In other words, it indicates, not the duration but the operation (while they endure,) of the rules of law. This remark is true of all the instances which are adduced in Broom's Maxims 68–70, under this head, and likewise of all those which are adduced in Wingate's Maxims 29–38, under the maxim *cessante causa, cessat effectus*; which is evidently treated there as the same maxim in effect. So considered, it is akin to another maxim, *ubi eadem ratio, ibi idem jus*, or as it is sometimes said, *ibi eadem lex*; and of the two a third might be compounded, which perhaps would be more perfect, than either of them taken singly; viz: *ubi eadem ratio, ibi eadem lex; cessante ratione, cessat et lex*. At present no instance is remembered, in which an acknowledged rule of law has ceased to exist, while any subject has remained on which it could operate, only because the reason on which it was first introduced, has ceased: but some remarkable instances to the contrary suggest themselves. Most lawyers will at once think of the powerful and convincing argument of Mr. Fearn, against treating the rule in Shelley's case as obsolete, even if it were conceded that all the reasons on which it was founded, had ceased.* So, the only reason originally, why a distress for rent was incident to the reversion, was, that the tenant owed fealty to the

*See Butl. Fearn, 87–89; also, V. C. 1849, ch. 116, sec. 11.

reversioner; fealty is abolished in America, and yet the right to distrain still continues incident to the reversion, and of common right exists only where there is a reversion.* And so (not to multiply examples further,) though every imaginable reason for attributing more efficacy to a sealed instrument, than to the same instrument with the signature but without the seal of the party, has long ago ceased, yet no one will venture to say that the numerous rules of law founded upon that difference, or any of them has ceased, further than as they have been actually abolished by the legislature.† But I confess, these are my first thoughts upon a point which I have never before considered, and upon which I think it immaterial to form any settled judgment at present.

For it seems to me, that the discussion in which I have engaged, may be brought to a satisfactory close, upon the other and *main question*; *which is, whether the first position in argument of the Connecticut counsel before quoted, is true.*

In 1 Lom. Dig. 64–65, the following passage occurs: “The reason for requiring this seisin in fact [of the wife] is (as has been said,) to entitle the heir to take the estate from her in that character, which is essential to the husband’s title. For it is a rule of the English law of descents, that the heir claiming by descent must derive his title from the person last actually seised of the inheritance. If, therefore, the wife was not so seised, he could not inherit from her, and consequently, one of the requisites of the husband’s title to curtesy would be wanting, viz: having issue that would inherit the estate from the wife. To which passage, Judge Lomax appends this note: “If the reason of this rule which requires seisin in fact, has its foundation in the maxim of the English law of descents, *seisina facit stipitem*, then it would seem to follow, that the Virginia law of descents, having repealed that maxim, has dispensed with actual seisin, as essential to the husband’s title to curtesy. If that title fails, *solely* upon the ground of the incapacity of the issue by the marriage to inherit, the rule, to be consistent, would sustain the title to curtesy, wherever there had been a seisin in the wife, such as would make the issue inheritable to her estate. The disqualification of the husband’s title should only be commensurate with the inheritable incapacity of the issue by the marriage, and should be confined to such cases.

*Tuck. Comm., B. 2, p. 14–18; 1 Lom. Dig. 547, 548; 3 Gratt. 212.

†On this subject of seals, some very nice and curious doctrine was laid down by the Virginia court of appeals, in the case of Pollock and Wife v. Glassell, 2 Gratt. 439.

It is equally requisite, as we shall hereafter see, in the law of *dower*, that the issue by the marriage should be capable of inheriting to the husband, in order that the title to dower should be sustained. So far as the maxim referred to in the law of descents can have any operation, it, would equally apply to the law of dower, as to the law of curtesy; and precisely the same seisin is necessary to make the husband the root of the descent to the issue of the marriage, as would be required in regard to the wife. The issue could no more inherit from the one than from the other, if there had been only a seisin in law in that ancestor from whom the descent was claimed. The law would seem to be inconsistent with its own purposes, if it could allow a seisin in law in the one case to be sufficient, when a seisin in fact is required in the other, *if* it has based its rule *merely* upon the principle of the inheritable capacity of the issue, as that capacity may be affected by the nature of the seisin. Nor would the reason of the rule seem to make it necessary that the wife, or rather the husband and wife, should have been seised of the estate of the wife, *during* the coverture. A seisin of the wife at any time, whether *before* or during the coverture, would be sufficient to make her the root of the descent; and the issue might equally claim as heir from the deceased wife, who was the ancestor last actually seised. As her seisin before coverture would give the issue a complete title in the character of her heir, it would seem difficult to explain why the husband should not be entitled to curtesy [as he would not be—in case she had also been disseised before the coverture, and the seisin had not been restored before the coverture was terminated], *if* seisin were referred to *merely* because of its influence upon the inheritable capacity of the issue. Notwithstanding the high authority, which sanctions the reference to the maxim of the law of descents, as the foundation of the rule requiring seisin in fact to give a title to the curtesy, it seems questionable whether it is not to be sought for in some other principle of policy; and if so, the rule of the common law of curtesy remains unchanged by the alteration which has been made in the law of descents of Virginia.”

Of these very striking remarks, perhaps those which relate to the law of dower may be shown to be inconclusive, and even inapplicable, by referring to the distinction between curtesy and dower, which I mentioned in the beginning, and numerous other distinctions between them, but chiefly by referring to that distinction between the husband and the wife—*sub potestate viri*—which is mentioned in connexion with

this subject by so many writers, ancient and modern,* and by Judge Lomax himself. "There is no necessity (says he,) of a seisin in fact, as in the case of curtesy; for a seisin in law will be sufficient, *otherwise* it would be in the husband's power, either by his negligence or malice, to defeat his wife of that subsistence after his death, which the law has provided for her, and *she* cannot enter to gain a seisin in her own right, as *he* may do into lands descended to her in order to entitle himself to curtesy."† But without stopping to consider whether in this or in any other way that portion of his note would be sufficiently answered, it seems certain that the residue of the remarks contained in it is so far unanswerable, as to outweigh *any* modern authority, which "sanctions the reference" he speaks of. He does not indeed *cite* any; for though he mentions *Doe v. Hutton*, 3 Bos. & Pull. 643, yet neither in that case, nor in *Buckworth v. Thirkell*, as reported in the note to it, or in 1 Coll. Jur. 332,‡ or in 4 Doug. 323, is there mentioned any *dictum* of judge, counsel, or reporter, that does refer the doctrine to any source whatever. And therefore it is a gross mistake of Mr. Roper, to say, as he does: || "In all cases where actual seisin by the wife can be acquired, as of lands and tenements, it must be obtained in order to found the husband's claim to the curtesy. The reason is to enable the heir to take the estate from her in that character, which is essential to the husband's title; for it is a rule of law, that the heir claiming by descent, must derive his title from the person last actually seised of the inheritance. If, therefore, the wife was not so seised, he could not inherit it from her; so that one of the requisites of the husband's title to the curtesy would be wanting, viz: issue that could inherit the estate by descent from the wife. *The reader will find this subject fully and ably discussed and explained in the case of Doe v. Hutton, decided in the court of common pleas, and reported in Bosanquet & Puller's Reports, vol. 3, p. 643.*" It is true, that the case cited contains a copious and learned discussion of the maxim of descents, *seisina facit stipitem*, and more particularly of the rule founded upon it, *possessio fratris de feodo simplici facit sororem esse hæredem*, both of which are touched in the extract which has been given from the opinion of Judge Reeve; but in no part

*Bro. Abr., tit. Dower, pl. 75; Co. Lit. 31 a, Baron and Feme 79, 1st edit.; 2 Blackst. Comm., 131; Laws Respecting Women, 197, 198, (a book much commended by Mr. Preston, 1 Abst. 229, 230); Clanc. Husb. and Wife, 198, 3d ed.; 1 Rop. Husb. and Wife, 352; Jacob's edit. Lamb. Dow. 8; Tuck. Comm., B. 2, page 61.

† 1 Lom. Dig. 78.

‡ P. 247, Dub. edit.

|| Husb. and Wife, vol. 1, p. 7.

of the report is there a hint dropped of any connexion between that doctrine, and the rule concerning curtesy, which we are now considering. But besides the passage from Roper just quoted, Judge Lomax might have cited Baron and Feme, 74; 2 Blackst. Comm. 128, (a passage which it may be worth while to observe, Judge Tucker has *not* transcribed into his Commentaries); * Laws Respecting Women, 165; Clanc. Husb. and Wife, 181, and (*instar omnium*,) the great name of Sir Edward Coke, who makes that statement both in his Commentary on Littleton, fol. 40, a, and in the report which, while chief justice of the court of common pleas, he published of Paine's Case, 8 Rep. 36, a. And perhaps this last is the "high authority" which he had in his contemplation.

It is indeed, *clarum et venerabile nomen*, and most deservedly held in such high estimation, as ordinarily to deter any man, who knows what reverence is due, and by the learned paid to it, from calling in question, for the first time, any doctrine which *it* can be vouched to maintain. And in the present case, the danger to him that does so, is enhanced by the fact, that this particular doctrine has been received without question, on the part of his very learned and diligent editors, both of the Institutes and of the Reports, on the part also of the more numerous editors of Blackstone's Commentaries, and on the part of most (if not all) others, (until it was modestly questioned by Judge Lomax, in the manner we have seen,) and propagated by succeeding writers as true, down even to the present day. For besides those already mentioned, of whom one at least is himself a great authority, it has been also laid down, and argued upon as unquestion-

* But which shall be here set down—at large—for the sake of the reflection with which it concludes. After stating that "in general there must be issue born, and such issue as is also capable of inheriting the mother's estate," our author proceeds: "And this seems to be the principal reason why the husband cannot be tenant by the curtesy, of any lands of which the wife was not actually seised; because, in order to entitle himself to such estate, he must have begotten issue that may be heir to the wife; but no one by the standing rule of law can be heir to the ancestor of any land, whereof the ancestor was not actually seised; and therefore, as the husband hath never begotten any issue that can be heir to those lands, he shall not be tenant of them by the curtesy (Co. Litt. 40.) *And hence we may observe, with how much nicety and consideration the old rules of law were framed; and how closely they are connected and interwoven together, supporting, illustrating and demonstrating one another.*" A reflection most misplaced, if the demonstration furnished in the text be as complete as I think it is, to prove that the two rules here spoken of are *not* "connected" at all, much less interwoven together.

able law, and leading (under the recent English statute of descents) to new and important conclusions, by an English writer later even than Judge Lomax.*

Under all these discouragements—yet in the humble hope of demonstrating **THE TRUTH**—*I venture to deny utterly this doctrine of Sir Edward Coke; and consequently the position (of counsel in Bush v. Bradley)—on which (as before stated,) the main question depends.*

It is emphatically Sir Edward Coke's doctrine. It was never hinted by any one before him. In his Commentary on Littleton, he cites no authority for it, but his own report of Paine's case; and in that he cites no authority for it at all. For the year books there mentioned† are cited to prove that "the issue ought to make himself heir to him who was last actually seised,"—as Mr. Hargrave has observed,‡ and they could not have been cited to prove anything more, as appears upon a careful examination I have made of them. And as the doctrine was first suggested in his report of Paine's case, so, upon comparing that with the better reports of the same case, in 1 And. 184; 1 León. 167; and Gouldsb. 81; and reflecting upon his manner of reporting in general, it seems altogether unlikely that it was suggested by any one concerned in that cause, either upon the bench or at the bar. For the case having been argued by serjeants at law, in the court of common pleas, about the middle of the reign of queen Elizabeth, it is certain that he was not engaged in it. And taking it to be his own doctrine, it appears to be one instance of that "attempting to give reasons for every thing," which Lord Mansfield took notice of, and censured in him,|| and which, in regard to this particular subject, as we shall see in the sequel, was condemned in advance by an able author, who wrote long before his time.

Judge Lomax has shown, that by the English law, the issue of the marriage may, in one familiar instance, take by descent from his mother, lands in which, for want of seisin in fact during the coverture, his father cannot claim an estate by the curtesy. Other less familiar examples to the same effect might be added, but to avoid wearying the reader, only one shall be mentioned, and that shall be taken from Coke on Littleton, fol. 29, b: "If a woman, tenant in tail general,

*See Williams on Real Property, 168, 169.

†11 Hen. 4, 11; and 40 Edw. 3, 9; see note, *postea*, p. 19.

‡Co. Litt. 40, a, note 2.

||See Butl. Remin., part 1, art. 11, sec. 1, p. 108, edit. N. York, 1825; 1 Rosc. Brit. Lawy. 265, edit. Phila., 1841.

maketh a feoffment in fee, and taketh back an estate in fee, and take a husband, and hath issue, and the wife dieth, the issue may in a formedon recover the land *against his father*, because he is to recover by force of the estate *tail*, as heir to his mother, and is not inheritable to his *father*" (a mistake, as it seems, for his "*mother, as tenant in fee simple.*") The *rationale* of which, if it be not obvious enough, is explained in Mr. Hargrave's note to the passage, and in Mr. Thomas' extract,* from the *first* edition of Prest. Est. 519.

But what seems more to the present purpose, by the same law (and here I beg to be understood throughout this discussion, when speaking of the English law of descents, as meaning that law *prior* to the recent alterations in it by statute,) in some cases the husband shall be tenant by the curtesy, where the issue of the wife shall not inherit *as heir to her*, and shall *not so inherit*, for no other reason than the want of this very requisite of actual seisin. To prove this let us again resort to that great repository of the law of real property, the Commentary on Littleton; in which Sir Edward Coke puts the following case, or rather cases: "A man seised of an advowson or rent in fee, hath issue a daughter, who is married and hath issue, and dieth seised, the wife before the rent became due, or the church became void, dieth, she had but a seisin in law, and yet he shall be tenant by the curtesy."† And with this, numerous other authorities accord.‡ But the issue of the marriage, *because* the wife "had but a seisin in law," shall not *as heir to her*, take either the advowson or the rent; as shall be presently made amply to appear.

The reason, why in these cases the husband shall be tenant by the curtesy, which Sir Edward Coke and most others have assigned, is, "because he could by no industry attain to any seisin, *et impotentia excusat legem.*"§ But the author of the tract in the New Abridgment, commonly called Bacon's, under the title "Curtesy of England," and who was probably Lord Chief Baron Gilbert, after noticing this as the reason given in "the books," proceeds to say: "But the true rea-

*1 Thom. Coke 561, note 12.

†Co. Lit. 29, a.

‡Y. B. 7 Edw. 3, 66, a, b, and 3 Hen. 7, 5, a, cited *ibid.*; and in 1 Rep. 97, b, 98, a, *arguendo* in Shelley's case; and in 6 Rep. 63, a, Finch's case; and abridged in Fitzh. Abr., tit. Barre, pl. 293; and tit. Descent, pl. 8; and in Bro. Abr., tit. Tenant per le Curtesy, pl. 5, 9; Keilw. 104, b, pl. 13, Anon. F. N. B. 149, D.; Dod. Advows. 21; 2 Sid. 110-117, Deitrick v. Bradburne.

§Co. Lit. 29, a; Baron and Feme 74; 2 Blackst. Comm. 127; Laws Respecting Women 164; Clanc. Husb. and Wife 181; 1 Rep. Husb. and Wife 17.

son is, that the wife hath these inheritances which lie in grant, and not in livery when the right first descends upon her; for she hath a thing in grant when she hath a right to it, and nobody else interposes to prevent it." * Perhaps Judge Tucker (who has omitted to transcribe what Sir William Blackstone writes on *this* point also,) thought this latter to be what the author just quoted called it, "the true reason," and *therefore* wrote, "there is a distinction between such inheritances as are susceptible of a seisin in fact, and those which are not. Of the former, such as lands, there must be an actual seisin or possession; but of the latter, such as a rent, a seisin in law is sufficient." † Perhaps, however, he only meant to go as far as Mr. Preston before him, and Judge Lomax since have gone; the former of whom says: "the wife, or the husband in her right, must have a seisin in fact and not a mere seisin in law, except in *those cases in which, as advowsons, &c., the husband cannot by any industry, obtain a seisin in fact.*" ‡ And the latter says: "where the inheritances lie in grant, so as to be incapable of the same seisin as lands and tenements, actual seisin by the wife during the coverture cannot be required;" of which the *example* he gives is precisely the same that has been already quoted from Co. Lit. || It is probable, therefore, that he and Mr. Preston, and perhaps Judge Tucker, meant not to carry the doctrine beyond the limits set to it by Sir Edward Coke, and within which only it is sustained by the principal authorities. But if they meant to go as far as the broadest interpretation of their words would carry us, their doctrine would be fully sanctioned by two sections (468, 469) of Perkins, which none of them have quoted, and which are in the following words: "If there be father and daughter, and the father is seised of an advowson in gross in fee, the daughter taketh a husband, and the father dieth, so as the advowson descendeth unto the daughter, and the daughter hath issue by her husband, and dieth before that the advowson doth become void, yet the husband shall be tenant by the curtesy. *And notwithstanding that the advowson doth become void during the coverture, and the wife dieth after the six months past, and before any presentment made by the husband, &c., so as the ordinary doth present, for lapse, under this avoidance, yet the husband shall present unto the next avoidance as tenant by the curtesy, &c.* If a rent do descend in fee unto a married woman, and she dieth before any day of payment, yet the husband shall be tenant

*Bac. Abr. tit. Curtesy of England, c. 2.

† Tuck. Comm., B. 2, p. 58.

‡ 3 Abstr. 381.

|| 1 Lom. Dig. 66, 67.

by the curtesy of the rent, notwithstanding that there was not any seisin of the same rent during the coverture betwixt them. *And notwithstanding that the day of payment of the rent incurred in the life of the wife, and the wife dieth before any demand of the rent made by the husband, yet the husband shall be tenant by the curtesy, &c.*" Upon which it may be observed, 1, that Perkins distinctly carries the doctrine in favor of the husband, further than Sir Edward Coke; 2, that for that excess it is questioned by Mr. Hargrave,* by Mr. Munchal,† and by Mr. Roper;‡ though Mr. Clancy states the conflict, without indicating any leaning of his own to either side;§ and 3, that *such excess MAY be true, though the reason given in Bacon's Abridgment be false, but cannot be false, if the other be true.* For that reason means, (if anything at all to the purpose for which it was adduced,) that of inheritances which lie in grant as soon as they descend to the wife, she has *ipso facto* full possession and that perfect title, which is defined to be *juris et seisinæ conjunctio*, unless her possession be *de facto* disturbed by an adversary. But in this sense the position is certainly false; for if such were the law, inheritances of that description would descend upon the death of the wife, who had obtained no *other* seisin, to *her* heirs at law—the contrary whereof is true. And indeed, Perkins in the passage just quoted from him, may be cited as an authority against the position, so understood; for in the case of the rent, he says expressly, that "there was not any seisin of the same, during the coverture."

That in the cases put by Sir Edward Coke, of the advowson and the rent, the same would descend not to the wife's heir, *as such*, but to the heir of her father, as the person last actually seised, would seem to be clear enough on principle, if it were not for the doctrine suggested in the passage cited from Bacon's Abridgment; but if such a passage had never been written, or discovered, in a discussion like the present I should have thought it proper to fortify this important position by authorities in point. Accordingly, such have been sought and found. According to Fitzh. Abr., tit. Descent, pl. 3; Bro. Abr., tit. Descent, pl. 32; and Roll. Abr., tit. Descent, K., pl. 10, § it was so decided in the case, which is reported in the Y. B., 3 Hen. 7, 5, a, pl. 19; though in the last edition, (A. D. 1697,) probably from an imperfection of the print, that does not *distinctly* appear in the year book

* Note 5 to Co. Lit. 29, a.

† Dr. and Stud., dial. 2, ch. 15, n., 18th ed.

‡ 1 Husb. and Wife, 17.

§ Clanc. Husb. and Wife, 181.

§ See also Roll. Abr., tit. Descent, K, pl. 11.

itself. There it stands as follows—substituting for the original, so far as it is perfect, a literal translation: “One seised of an advowson, in gross, had issue a son and a daughter by one venter, and a son by another venter, and died; his eldest son died before any presentment by him had. And it was argued, if the daughter should have it, or the brother. And it was touched, that the brother should have it. And of the other part, it was touched that the daughter (feme) should have it, because if she was seised of rent, and took baron, he should be tenant by the curtesy of England, *nienobtant l'avows et nemy la fil, &c.*” These last words leave the sense incomplete, but they seem to mean that it was held by some person or persons, that the youngest son should have the advowson as heir to his father, and not the sister as heir to her brother; and so the case has been understood by all the abridgers. And that it was so decided, there can be no reasonable doubt; for Fitzherbert, who was a contemporary, and whose account of the case in some respects is evidently taken from another source, states, with minute particularity, that it was so held by “three of the justices.” As his account is also short, I will give a literal translation of the whole of it: “If a man [be] seised of an advowson, in gross, and have issue a son and a daughter by one venter, and a son by another venter, and die, and the eldest [son] die; three of the justices held that the puisne son shall have the presentment, because there was not a presentment in the eldest; and others [that is, those “of the other part,”] said, if a feme seised of rent take baron, he shall be tenant by the curtesy before possession of the rent, so here, &c.” And according to that decision is the law, as stated in several other books;* which is confirmed by the settled and unquestionable law, in the strictly analogous but more common cases of remainders and reversions.†

These authorities I *expected* to find, but I was certainly much surprised to meet with the following, which is furnished by sir Edward Coke himself. It occurs in his comment upon the beforementioned rule of *possessio fratris*.‡ “If a rent or an advowson do descend to the eldest son, and he dieth before he hath seisin of the rent [which must mean a seisin in fact, since the very descent gives him a seisin in law;] or present to the church, the rent or advowson shall descend to the

*3 Rep. 41, b, Ratcliffe's case; Co. Lit. 11, b; Dod. Advows. 21; 1 Show. 245, 246, *arguendo* in Kellow v. Rowden.

†See Burton on Real Property 105, 106; Butl. Fearn. 561.

‡Co. Lit. 15, b.

youngest son, for that he must make himself heir to his father [the person last actually seised,] as hath been oftentimes said before. The like law is of offices, courts, liberties, franchises, commons of inheritance, and such like. *And this case DIFFERETH from the case of the tenant by the CURTESY, for there if the wife dieth before the rent day, or that the church become void, because there was no laches or default in him, nor possibility to get seisin, the law, in respect of the issue begotten by him, will give him an estate by the curtesy of England. But the case of the DESCENT to the youngest son, STANDETH UPON ANOTHER REASON, viz: to make himself heir to him that was last actually seised, as hath been said.*"

It is very remarkable, that after writing this, he should, in the same work, and only a few pages later, have written, "except the wife be actually seised, the heir shall not (*as hath been said*) make himself heir to the wife; and THIS IS THE REASON that a man shall not be tenant by the curtesy of a seisin in law."* And it is almost equally remarkable, that such editors as he has had, should not have been struck with the gross and glaring inconsistency of the two passages; which, now that they are brought into a close juxtaposition, must (it is supposed) be immediately apparent.

But, however that may be, since it has been shown, 1. that in many cases the issue may inherit as heir to the wife, *as the person last actually seised*, when nevertheless, for want of such actual seisin *during the coverture*, the husband cannot claim to be tenant by the curtesy; and 2. that in many cases, on the other hand, the husband may be tenant by the curtesy, when nevertheless, because *the wife was not the person last actually seised*, the issue cannot inherit *as heir to her*; it seems to be absurd any longer to maintain what, let it be borne in mind, was never suggested till the time of sir Edward Coke, that the maxim (as it is called by St. Germain in a passage to be presently quoted,) which requires actual seisin during the coverture, in some cases, but not in all, to make a man tenant by the curtesy, has any connexion whatever with the maxim of the law of descents, which requires in all cases without exception, that the heir shall be heir to the person last actually seised.

And therefore, as the result of all that has been said, *it seems that we may confidently rest in the conclusion*—That by the law of Virginia, as by that of England, the husband, to entitle himself as tenant by the curtesy, must have been, during the coverture, actually or virtually seised in deed, in all

*Co. Lit. 40, a.

cases except only those, in which as exceptions to the general rule, it can be shown, by express authority, that such seisin is dispensed with. Of this, if there be any who still doubt, it is propable that their doubts will be removed, upon perusing some further observations, which, as being useful in other respects, I shall communicate, if leisure serve, hereafter, but have forbore to introduce here, because the present argument would have been needlessly (as it was thought,) encumbered by them.* And I shall appropriately terminate it by transcribing (because the book is scarce,) the whole of the remarks made upon this subject, with so much learning, judgment, and good sense, by Christopher St. Germain, whose work was published early in the reign of Henry the Eighth.

"Student. A man seised of certain lands in fee hath a daughter, which is heir apparent, the daughter taketh an husband, and they have issue; the father dieth seised, and the husband as soon as he heareth of his death goeth toward the land to take possession, and before he can come there, his

* Besides the alleged reason for the rule in question, which we have now been considering, Sir Edward Coke seems to assign, or least to suggest another, in his report of Paine's case, 8 Rep. 36, a. The whole (very curious) passage, is as follows: "And where Littleton [sect. 52] saith, *as heir to the wife*, these words are very material, for that is the *true* reason that a man shall not be tenant by the curtesy of a seisin in law, for in such case the issue ought to make himself heir to him who was last actually seised &c., *vide* 11 Hen. 4, 11; 40, Edw. 3, 9, &c. *And the tenant by the curtesy shall be attendant to the lord paramount, which he cannot be, because the wife died before she was actually seised: BUT* tenant in dower shall not be attendant to the lord paramount, but to the heir, and *therefore* she shall be endowed of a seisin *in law*." Now in this passage it was—or it was not, intended to suggest an additional reason, besides the one first assigned. If such was the intention, it seems strange that the first was called the "*true*" reason; for the second is certainly noway dependant upon it, but altogether sufficient by itself, if it be true. *And if it be so, then it furnishes aid to the arguments urged in the text, in opposition to the first as the true reason.* At the same time if *this* be that "other principle of policy," in which (to use judge Lomax's expression:) "the foundation of the rule" is to be sought; it would be easy to demonstrate that the rule itself (like so many other rules growing out of, or connected with the *feodal* system,) is unaltered in Virginia, notwithstanding the *allodial* character at this day of all real property in that state. In the text I have made no remark upon this suggestion, for that reason partly—but principally because the suggestion itself (supposing it to have been intended,) has been ever since, (so far as I have learned,) utterly unheeded, not only by others, but even by Sir Edward Coke, himself, who did not transfer it into his Commentary on Littleton, along with what he calls "the true reason." And this leads me to observe, that by the use of that expression he seems to have condemned the suggestion even in the moment of making it, if he designed to make it at all. And if he did not then *what* did he intend, by inserting the last sentence of the quotation? This topic may possibly be handled more at large, in the contemplated "further observations" mentioned in the text.

wife dieth : whether ought he to have the land in conscience for term of his life as tenant by the curtesy, because he hath done that in him was, to have had possession in his wife's life, so that he might have been tenant by the curtesy according to the law ; or that he shall neither have it by the law nor conscience ?

"*Doctor.* Is it clearly holden in the law, that he shall not be tenant by the curtesy in this case, because he had not possession in deed ?

"*Student.* Yea verily,* and yet upon a possession in law a woman shall have her dower; but no man shall be tenant by the curtesy of land, without his wife have possession in deed.

"*Doctor.* A man shall be tenant by the curtesy of a rent, though his wife die before the day of payment, and in likewise of an advowson, though she die before the avoidance.

"*Student.* That is truth; for the old custom and maxim of the law is, that he shall be so: but of land there is no maxim that serveth him, but† his wife have possession in deed.

"*Doctor.* And what is the reason that there is such a maxim in the law, of the rent, and of the advowson, rather than of land, when the husband doth as much as in him is, to have possession, and cannot ?

"*Student.* Some assign the reason to be, because it is impossible to have possession in deed of the rent, or of the advowson, before the day of payment of the rent, or before the avoidance of the advowson.

"*Doctor.* And so it is impossible that he should have possession in deed of land, if his wife die so soon that he may not by a possibility come to the land after her father's death, in her life, as the case is.

"*Student.* The law is such as I have showed thee before : and I take the very cause to be, for that there is a maxim serveth for the rent and the advowson, and not for the lands, as I have said before: and, as it is said in the eighth chapter of our first dialogue, *it is not alway necessary to assign a reason or consideration why the maxims of the law of England were first ordained and admitted for maxims ; but it sufficeth that they have always been taken for law, and that they be neither contrary to the law of reason, nor to the law of God, as this maxim is not ; and therefore, if the husband in this case be not holpen by conscience, he cannot be holpen by the law.*

"*Doctor.* And if the law help him not, conscience cannot

**Acc. Perk.*, sect. 470.

† *That is, be-out, with-out, unless: see Horne Tooke's Diversions of Purley, p. 100-117, Lond. ed. 1840.*

help him in this case, for conscience must always be grounded upon some law; and it cannot in this case be grounded upon the law of reason, nor upon the law of God; *for it is not directly by those laws, that a man shall be tenant by curtesy, but by the custom of the realm*; and therefore if the custom help him not, he can nothing have in this case by conscience; for conscience never resisteth the law of man, nor addeth nothing thereto, but where the law of man is in itself directly against the law of reason, or else the law of God, and then properly it cannot be called a law, but a corruption; or where the general grounds of the law of man work in any particular case against the said laws, as it may do, and yet the law [be] good, as it appeareth in divers places in our first dialogue in Latin; or else where there is no law of man provided for him that hath right to a thing by the law of reason, or by the law of God: and then sometime there is remedy given to execute that in conscience, as by a *subpœna*, but not in all cases; for sometime it shall be referred to the conscience of the party, and upon this ground, that is to say, that when there is no title given by the common law, that there is no title by conscience. There be divers other cases, whereof I shall put some for an example: As if a reversion be granted unto one, but there is no attornment, or if a new rent be granted by word without deed; there is no remedy by conscience, unless the said grants were made upon consideration of money, or such other. And in likewise, where he that is seised of lands in fee simple maketh a will thereof,* that will is void in conscience, because the ground serveth not for him, whereby the conscience should take effect, that is to say, the law. And if the tenant make a feoffment of the land that he holdeth by priority, and taketh estate again and dieth (his heir within age,) the lord of whom the land was first holden by priority, shall have no remedy for the body by conscience; for the law that first was with him, is now against him, and therefore conscience is altered in likewise as the law altereth. [The modern phrase is *acquitur sequitur legem*.] And divers and many cases like be in the law, that were too long to rehearse now. *And thus methinketh, that if the law be as thou sayest, the husband in this case hath neither right by the law nor conscience.*"†

G.

*The statutes of wills were made subsequently, in the latter part of the reign of Henry the Eighth.

†Dr. and Stud., dial. 2, chap. 15.

TITLE BOND—ONUS OF PROOF.

Hotchkiss for, &c. v. Floyd.

United States District Court at Wytheville. October Term, 1858.

A bond expresses upon its face that it is given for the purchase money of land; and to an action on such bond there is an equitable plea that the plaintiff had no such land, and would not make title to any such land. By an issue joined on this plea the *onus* is upon the plaintiff to prove that he has the land and can make title thereto.

Archibald Hotchkiss, for the benefit of *B. Dubois*, brought an action of debt against *Wm. P. Floyd*, upon a single bill for \$2,428, due January 15, 1838. On the face of this paper it was expressed to be "the amount due for the final payment for one league of land situated on Red River, in the Republic of Texas, which the said *Hotchkiss* has this day sold to *W. P. Floyd* and *W. L. Lewis*," "as will more fully appear by the bond of said *Hotchkiss* this day given to said *Floyd* and *Lewis*."

There was a special plea under the statute concerning equitable set-offs, in which after taking *oyer* of the single bill, it was alleged that "when the said writing obligatory was executed, the plaintiff did not own any land on Red River in the Republic of Texas, to which he could make any good title;" whereupon the consideration had wholly failed. To this plea there was a general replication.

The case was submitted to the court upon this question, "On whom is the burthen of proof upon this issue?"

B. R. Johnston for the plaintiff.

Fulton and *R. B. Floyd* for the defendant.

BROCKENBROUGH, J.

This cause does not come on regularly for trial; the counsel desiring to hear the opinion of the court upon a preliminary question; which opinion, however, as I understand, will probably decide the case.

As a general rule, the party holding the *affirmative* of an issue must sustain that affirmative by proof. There are various exceptions to this rule—some of the more important of which are mentioned by President TUCKER in his judgment in *Hinchman v. Lawson*, 5 Leigh 595. A number of cases are there mentioned in which the party holding the negative was required to give proof of that negative. But it will be observed that in all or nearly all of those instances, the propositions, though in a

negative form, really involved affirmative propositions. How does this rule, then, apply itself to this case?

This is a plea which could not have been filed at common law, which never allowed the *consideration* of a deed to be inquired into. But the statute of 1831, copied into the Code of 1849, permits the defendant, in an action upon a contract under seal, to plead and prove the failure of the consideration, and the damages resulting from such failure are to be set off against the demand. This plea has been filed under that statute, and is in strict conformity thereto.

To such a plea the statute allows only a general replication; but directs that any matter which might furnish ground for a special replication may be given in evidence under the general replication. Then it would be necessary for the plaintiff to show such matter in evidence as would amount to a good special replication to this plea. Now, I suppose, the statute permitted a special replication to this plea: what must that replication necessarily have been, surely it could only be in substance, that "the plaintiff did own land on Red River, in Texas, to which he had and could make good title, according to the obligation and effect of his said title bond." Now this is really what the issue would be, if made up in a complete form. Upon this issue the defendant could not be called upon to sustain the negative. He could not prove that the plaintiff had no such land. But it would be easy for the plaintiff, if the facts are really with him, to adduce the proof. If he has any such land his title papers will settle the question.

In *form* this is a plea in *confession and avoidance*; because it admits the execution of the bond, and confesses that it was once a valid obligation. But it is such a plea *only* in form, and it assumed that form only in accordance with the requisitions of the statute which makes it a plea of *set-off*, or rather of *recoupment*. Now it is a general rule that the defendant must always assume the *onus* of proving any matter in confession and avoidance. By his plea he admits the cause of action, and it devolves upon him to make good the matter which avoids that cause of action. But I do not think this rule applies to this case: because this plea, though in *form*, (and necessarily so,) one in confession and avoidance, is really a plea in *bar*. I understand a traverse in bar to be a plea denying the original cause of action: one that shows that the plaintiff never had any right to claim what he demands in his declaration. Now this plea really has this very effect. The consideration for which this single bill was given is expressed upon its face; being a certain quantity of land, located in a particular region, on a given stream. The plea alleges that this consideration never did ex-

ist—because the plaintiff never had such land; and therefore the single bill never had any obligatory force. I hold that the plaintiff must rebut every plea in bar: that when the original obligatory force and validity of the instrument is questioned he must be prepared to maintain it. Here that validity is questioned, and the plaintiff must repel the plea denying that original validity. In every point of view the *onus* in this case is on the plaintiff.

On this announcement of the court's opinion, the plaintiff suffered a *non-suit*.

NEGOTIABLE NOTE LOST BEFORE MATURITY—RELIEF IN EQUITY.

Burton v. Hartwell & als.

In the Circuit Court of the City of Richmond.

There may be in equity a recovery on a negotiable note, lost before maturity, both against drawer and endorsers, if a copy of note be properly protested, and proper indemnity offered.

Manner of protest in such case.

But the plaintiff losing will be required to pay the costs of the suit.

Hartwell, on the 10th day of Feb'y, 1858, drew a negotiable note, payable to Kent, Paine & Kent, or order, three months after its date, for \$802 71; the note was endorsed by Kent, Paine & Kent. Burton was the owner or holder of the note. His agent, on the way to the bank to deposit it for collection, lost or mislaid it; and the note was not afterwards recovered. The holder demanded the execution of a new note. A new note was not executed, and this was a suit in equity by Burton, the owner, against the drawer and endorsers, instituted before the maturity of the lost note, asking that the court should decree the execution of a new note, offering on the part of the plaintiffs indemnity against the lost note, if ever recovered, and for general relief. There were other facts stated in the bill, but as they did not peculiarly affect the decision of the point for which the case is reported, they need not be detailed. Before the cause was heard on its merits, the day on which the note fell due arrived; and on that day, at the Farmers Bank of Virginia and at the Bank of Virginia, (the holder not being positively

certain at which bank the note was made payable,) the holder deposited an indemnifying bond, with ample security, to indemnify and save harmless the endorser and drawer, in the event the lost note was recovered and passed into other hands; a copy of the note, as accurate as could be made, was also deposited at each bank, and the drawer and endorsers were duly notified that payment of the note would be on that day demanded at the said banks, and that indemnifying bonds had been executed; demand was duly made; the note was not paid; and there was a protest. These subsequent facts were brought properly before the court in the chancery suit above-mentioned.

The cause came on for argument at the Fall Term, 1858, before MEREDITH, Judge.

Alex. H. Sands, (of *Howard & Sands*, for plaintiff Burton: I shall confine my remarks to one point.

If Kent, Paine & Co. are *mere* endorsers on the note, are they responsible?

I maintain that they are. The authorities on the point are express and implicit.

The loss of a bill or negotiable note *does not change the contract* entered into *by the several parties to the instrument* in any material particular; its only effect is to give the parties called upon to pay, *a right to demand security* against any further or different liability than that which they have assumed. Edwards on Bills, 305; 7 Barn. & Cres. 90; Chitty on Bills, 263; Story on Notes, § 290.

Independent of any statute on the subject, the owner of a lost note or bill has a right to demand payment of it, on giving to the party liable sufficient indemnity; and where payment is refused on a tender of ample indemnity, the owner may enforce the collection in a court of equity, and recover the costs of the proceeding. See Edwards on Bills, 304; Walmsley v. Child, 1 Ves. Sen., 338, 344; Toulmin v. Price, 5 Ves., 288; Tercese v. Geray, Finch's Rep. 301; 6 Ves. 812; 16 Ves. 430.

It is not a rule of statute law *alone* that authorizes a recovery of claims on lost evidences of debt—either of lost bonds or of lost notes—either against principal and drawer, or against surety and endorser: the rule is based on the *common law*; but the common law, for the protection of the party liable, in a case in which a paper may be transferred by delivery, required that the party liable thereon should not be called upon to pay it until he was adequately protected against a second demand for the same debt, and as it was

formerly supposed that *only a court of equity* could properly provide for this protection, it was ruled that in case of the loss of negotiable paper transferable by mere delivery, the owner could *not maintain an action at law*. See Edwards on Bills, 295. He might, however, maintain an action at law on a lost bond, because there was no danger of a re-payment of the debt.

To relieve the holder from a chancery suit, the English statute was enacted, by which a suit at law might be maintained upon it in certain cases. This statute only provided *an additional remedy*; it did not enlarge *the right*, or give the right. *That* was created by the original contract.

The *right* to demand the payment of a *note* was a right subsisting even after the loss or destruction of the note, and there being no right without a remedy somewhere, equity stepped in and took jurisdiction for the benefit of both parties, for *the benefit of the owner* in decreeing his debt, for *the benefit of the debtor* in requiring indemnity, so that he should not be compelled to pay the debt a second time.

We are here in a court of equity, endeavoring to enforce a right. We have rendered, and the other parties have in their possession the fullest indemnity. Are we not entitled to satisfaction of the debt—to a decree for its payment?

After somewhat diligent search, I have found no authority that says that in any case the *obligation of a contract* is impaired or altered by the loss of the instrument which is its evidence. The contract is the same—it is equally binding, and all that the parties can require is, that when they fulfill it by paying it, they *shall not be called upon* to pay it again: and *this is done by the indemnity given here*. The authority from Edwards is express to this point.

It isn't pretended that the *drawer* is released by the loss of the instrument; his obligation is admitted to be the same.

Why, *then*, is the endorser released?

The *only difference is*, the one owes the debt, and contracts to pay in the first instance; the other, the endorser, is a surety and contracts to pay if the drawer does not, and due notice is given him.

Does the obligation of *this contract* rest upon the continued existence of the *paper*—will its loss destroy it? By no means. The court will perceive that the *contract* of the drawer and the contract of the endorser, is one thing, and the paper which is the evidence of the contract, is another and different thing, and as easily distinguishable in the case of the endorser as of the drawer; if the endorser can get rid of his obligation, *as conditional surety*, because the paper is lost, the drawer will

have the like reason to rid himself of the original obligation. To put *the endorser* and *the drawer on the same footing*, it is only necessary that the condition which forces the responsibility on the endorser should be complied with.

That has been done here. *The drawer has not paid—the endorser has been notified—the note has been protested—the endorser then stands now just as the drawer, so far as the owner is concerned.*

But I will not argue on the reason of the case any further. The authorities I have cited, it seems to me, clearly support this position—and I respectfully ask the court for a decree.

Howison replied—

Upon the facts stated as allegations in the bill, and proved in the depositions, I do not think the plaintiffs are entitled to a decree against Kent, Paine & Co., the *endorsers* requiring them to endorse a new note, or pay the amount of the note alleged to be lost.

The English decisions as far as I have been able to examine them, have never gone to the extent of giving such relief as against an *endorser*. See *Walmsley v. Childs*, 1 Vesey, 344, 345. *Glynn v. Bank Eng.*; 2 Vesey, 38.

They give such relief against the *maker* of the note, or against the *acceptor* of a draft, because they are at all events and finally liable, but the endorser stands on a different footing. His contract is special and collateral, and in order to make him liable, the *note he has endorsed* must be presented on the day when, and at the place where, payable, and if not paid by the maker, upon notice to the endorser, he is liable. It would be going very far to make an endorser liable on a new note, for the loss is always the result of more or less carelessness on the part of the holder or his agents, and it is just as equitable that the endorser should be discharged on a *lost note* as on a note which the holder, by oversight, fails to present *on the day and at the place for payment*.

As to the written agreement, (a copy of which is filed with the bill,) it does not help the plaintiff as against the *endorsers*, K. P. & Co. They only agreed to indemnify Chiles, and this they did fully, for the plaintiff admits that Chiles is discharged.

There is an English statute, 9 and 10, William III, 17, which is the foundation of the relief given generally in England, and it is remarkable that this statute confines the relief to the case of the *drawer* or *maker*.

It is evident that these cases of lost notes stand on a peculiar footing, because the court, even in giving relief, as against

the *maker*, always requires that full indemnity shall be given him, and that the *plaintiff* shall *pay the costs*. See *Burrows v. Goodhue*, 1 Iowa Rep. 48.

The question is one which, I presume, will regularly arise on a demurrer to the bill.

Wm. H. Lyons, for plaintiff, rejoined—

I insist that we are entitled to a decree in this case, upon two grounds.

1st. That although the note was given by Hartwell, and endorsed Kent, Paine & Co., yet to all intents and purposes, it was Kent, Paine & Co.'s note, and they expected to pay it, and had assets to pay it. Hartwell & Co. were indebted to Burton in the sum of fifteen hundred dollars, and Hartwell undertook to sell out the stock of goods. Chiles, the other partner, obtains an injunction to stop the sales. When Kent, Paine & Co. come forward and enter into an agreement to protect Chiles against any liability on account of the partnership, and particularly on account of Burton's claim, and stipulate that they shall have a lien on all of the property of Hartwell, and of the firm of Hartwell & Co., for all the debts for which *they are liable, or may become liable*, under that agreement: and Hartwell *grants* and agrees accordingly. In other words, he mortgages all the property of the firm, and of himself, to Kent, Paine & Co., and that mortgage is signed by all the parties. See Exhibit No. 1, filed with the bill. In this position of affairs, while Burton has a right to require payment at once of Kent, Paine & Co., he is persuaded to take a note at six months, endorsed by Kent, Paine & Co., for the balance: thus continuing their liability, and having a *mortgage* to secure them for all debts for which they were or might become liable, under that agreement. Surely, this was covered by the terms of the mortgage, and how could they expect Hartwell to pay it unless they should give him the money to pay it, or allow him to take the money from the property conveyed to them. Hartwell had failed, (as is proved in the case,) and had conveyed every particle of property to them, for their protection. Certainly, then, this note was given for their accommodation, because they were liable to pay the amount before the note was taken, and they only gained more time to settle it. They stand, then, in the position a *drawer* of a bill of exchange when he knew the drawee could not pay and had no funds of the drawer with which to pay. In such a case, the drawer is *primarily* responsible. See *Hopkink vs. Page*, 2 Brock, p. 20, *Byles on Bills*, p. 363, and the notes.

2d. Even if Kent, Paine & Co. should be considered, as mere ordinary endorsers, I still insist that we are entitled to a decree against them for the amount of the note. Their contract was, in that view, to pay the note if Hartwell did not pay it, and due notice was given them of the dishonor. That contract could not be altered or destroyed by the mere loss of the note: the note was the mere evidence of the contract, and they cannot claim to be discharged from the contract by the loss of that *piece of evidence*, when they admit the execution of the note, and it is also proved by the exhibits and the depositions. The deposition of Connell proves that the note was lost in the street, on a rainy day, and the fair presumption is that it was destroyed by the rain, as it has never been heard of since.

It is laid down in all the books I have been able to examine, that equity will direct the payment of the amount of the note, where it has been lost or destroyed, provided payment of the note was demanded and notice of the dishonor given to the endorsers, and indemnity tendered or given, to protect the endorser against the lost note, if it should be in the hands of a *bona fide* holder. And the reason given by the courts for not allowing an "action" at Common Law is that the Court of Law cannot judge of the sufficiency of the indemnity and that equity is the proper form. See the opinion of Lord Tenterden in *Hansford vs. Robinson*, 7 B. & C., p. 95, and *Bevon vs. Hill*, 2 Comp. 381. All of the decisions and opinions in such cases at Common Law, either in express language, or by the course of reasoning, admit that the maker and endorser are liable in equity, where indemnity can be required for them. In this case, as soon as the note was lost or destroyed, advertisement was made in the newspapers, notice was given at the banks, and to the maker and endorsers an indemnity offered them and given, and now in the possession of the endorsers, and a new note was requested, and Mr. Kent even promised to endorse a new note, (see the depositions of Chenery and myself,) and when it was found that Mr. Hartwell would not execute a new note (in consequence of some difficulty with Chiles,) then this suit was brought, asking for a discovery at which bank the note was payable, and Hartwell refusing to answer, and Mr. Kent pleading ignorance, the note was protested at both banks, the proof showing that it was payable at one of them, and payment was demanded of Hartwell in person, another bond tendered to him, to the endorsers, and notice of all these demands for payment and non-payment, &c., served on the

endorsers, and the protests made out (see protests, &c., by Mr. Nunnally, filed Nov. 30, 1858).

All possible precautions have been taken, and the endorsers have had full and proper notice that the plaintiff looked to them for payment, and they have had every opportunity to protect themselves in any settlement with Hartwell. Kent, Paine & Co., are now relieved from any responsibility to any one else on the lost note, even if in the hands of a *bona fide* holder, because the note was not presented by anybody else for payment, and they are, therefore, as to such holder (if there should be one,) discharged. They cannot be sued or compelled to pay by anybody else.

The court will find it expressly stated in Story's Equity, vol. , p. 103, 105, that equity will give relief upon the loss being proved and indemnity given. See Byles on Bills, p. 446, where it is said that if a bill is lost or destroyed, payment must, nevertheless, be made, and notice of dishonor given, and also Smith vs. Bockwell, 2 Hill, p. 482, 484. See Story on Notes, § 446, where it says that relief will be granted against *any antecedent party* by a Court of Equity. Story on Notes, § 348; Chitty on Bills, p. 288-89, 297, 389; 2 Robinson's Practice, new ed: p. 220; 15 Ohio Reports, p. 22; Chewning vs. Singleton, 2 Hill ch. p. 371.

Mr. Howison refers to the statute of 9 and 10, William III, as *giving* the remedy, and says that we have no such statute that the plaintiff is without relief. I think he is mistaken. That statute only gave additional relief to what the Chancery Court already possessed, and by examination of the cases cited already, the court will find that relief has been given in our sister states, where there was no such statute; and relief was given because it was in accordance with the principles of equity, and the authority of all the leading writers. Chitty, Story and Byles all give directions how to protest a lost note, in order to bind the endorsers, without regard to that statute. And Mr. Chitty, p. 295, 296, speaks of the remedy in equity as being separate and distinct from that afforded by the statute.

In some of the courts of the United States, relief is granted at *Common Law*. In Fales, &c., v. Russell &c., 16th Pickering, p. 315, it was decided that a recovery might be had for a negotiable note, "endorsed in blank," and lost before it became due, the court requiring indemnity.

I ask for a decree against Hartwell and Kent, Paine & Co. Indemnity has been for large amounts, and the bonds seem to be satisfactory, but we are willing to give any additional indemnity the court may think proper to require.

The following is the decree entered—

The court doth adjudge, &c., that the defendant, Charles Hartwell, maker, and Kent, Paine & Co., endorsers of the lost negotiable note, formerly held by the plaintiff, and set forth in his bill, do pay to the plaintiff the sum of eight hundred and two dollars, and seventy one cents, being the amount of said protest charges, with legal interest from the 13th May, 1858, till paid, it appearing that bonds of indemnity, with security, have been delivered to the defendants, to the sufficiency of which the defendants have taken no exceptions; and with the consent of the parties, by counsel, the court doth order that the plaintiff pay to the defendants their costs, deducting therefrom \$2 25, the fee for taking the depositions.

FRAUDULENT CONVEYANCES.

Enders' ex'ors et als. v. Glenn et als.

What is not a fraudulent conveyance for the benefit of creditors.

On the 16th of January, 1852, Thomas J. Glenn and Edwin P. Crenshaw, partners under the firm of Thos. J. Glenn & Co., made a deed to William Bootwright and William F. Waldrop, trustees, containing the following provisions:

That "whereas the said Thomas J. Glenn & Co. are largely indebted, but have sufficient property to pay their debts, if time be given to administer the same judiciously; and they are desirous of paying the said debts in full: Now, therefore, Glenn & Crenshaw, have given, granted, bargained, sold, assigned and transferred, and do by these presents give, grant, bargain, sell, assign, transfer and convey, with general warranty, unto the said William Bootwright and William F. Waldrop, all the property, claims and debts mentioned in a schedule annexed to the deed, each of said partners conveying and warranting separately his separate property.

"To have and to hold the same to the said William Bootwright and William F. Waldrop, their heirs and assigns forever.

"Upon this special trust and confidence, nevertheless, that the said William Bootwright and William F. Waldrop, their heirs, executors, administrators and assigns, shall per-

mit the said Thomas J. Glenn and Edwin P. Crenshaw to remain in possession of their separate property, and to take the issues and profits thereof until the said William Bootwright and William F. Waldrop shall be required to sell the same in the manner hereinafter mentioned. And that they, the said William Bootwright and William F. Waldrop, shall take possession of the partnership property, and proceed to collect the debts due or accruing to Thomas J. Glenn & Co., and shall administer the same in the following manner:—

“They shall operate the steam saw mill in all respects as Thomas J. Glenn & Co. might do, but for this deed; and for this purpose, they shall have power to appoint and compensate agents, to make purchases, to contract debts, payable out of the trust fund, to retain and use such of the trust property as may be necessary, and do all other things deemed by them necessary for the successful operation of the said mill. They shall sell the lumber sawed by the said mill, and all lumber and other property not necessary for the operation of the said mill, now on hand, and shall collect the proceeds thereof, which, together with the collections made of debts due to Thomas J. Glenn & Co., they shall apply in the following manner:

“1st. They shall pay the expenses of executing this trust, including the cost of drawing and recording this deed, and such commissions for themselves as the law allows to trustees.

“2d. They shall pay the debts mentioned in the schedule, principal, interest, and costs of protests, observing the priorities indicated by the classification therein, paying the first class first, and so on; but among debts of the same class, the payments shall be pro rata. They shall publish notice of the first dividend; and should any claims be presented, at or before the making of such dividend, not embraced in the schedule, they shall pay the same, if duly proved, giving to the holders thereof such priorities as the said holders are entitled to by the schedule, on account of other claims mentioned therein; and if the said holders be not mentioned therein, placing them in the last class. They shall pay no claims contested by the said Thomas J. Glenn & Co. until they are recovered at law, when they shall be embraced by the provisions hereinbefore made.

“3rd. After payment of all said debts, should there be any surplus, they shall pay the same to Thomas J. Glenn & Co.

“The said trustees shall continue their aforesaid operations

for three years from the date hereof, and so much longer as they shall be permitted to do so; but if, at the end of two years, a majority in value of the creditors, endorser and securities mentioned in the schedule shall require it, and if at the end of three years any of them shall request the said trustees, they shall sell the partnership property mentioned in the schedule, or so much thereof as may be necessary; and if the whole of said partnership property be insufficient, they shall sell the individual property of the said Thomas J. Glenn and Edwin P. Crenshaw, or so much thereof as may be necessary, making such sales of individual property, if the whole be not required, as far as may be proportionate to the balance due from each of the said partners of the firm. The said sales shall be at public auction, to the highest bidder, for cash, after reasonable notice in two or more newspapers, in the city of Richmond, of the time and place of sale. The proceeds of such sale shall be applied in the manner hereinbefore directed. Should the debts of the said Thomas J. Glenn & Co. be satisfied at the end of three years from date hereof, then this deed shall be void; otherwise, it shall remain in full force.

The planing machines and saws mentioned in the schedule, with their appurtenances, shall be retained by the said trustees, and operated in like manner with the steam saw mill, and the proceeds of said operations shall be applied in the manner hereinbefore directed.

If any creditor of the said Thomas J. Glenn & Co. shall sue them, the said creditor shall lose all the advantages of this deed, and be considered as not embraced thereby, unless such suit be necessary to establish the validity of such creditor's claims, in consequence of its being disputed by the said Thomas J. Glenn & Co.: in which case, if such creditor shall recover, he shall be considered as provided for in the deed in the manner hereinbefore directed; but this provision shall not prevent any endorser or security of the said Thos. J. Glenn & Co. from recovering under this deed any dividend to which he would otherwise be entitled by reason of money paid on account of such endorsement or securityship."

The trustees in this deed refused to execute the trust, and in Feb'y 1852, Edwin P. Crenshaw, one of the grantors, and A. V. Crenshaw and other creditors secured in the deed, filed their bill in the Circuit Court of Richmond city, stating that the trustees had refused to act, and asking the court to appoint a receiver to take charge of the trust property and sell the same, and pay the debts secured by the deed. In December, 1852, the plaintiffs having obtained judgments

against Thomas J. Glenn & Co., filed their bill, charging that the deed of January 16th, 1852, was fraudulent, and asking the court to vacate and remove the same out of the way of the executions of their judgments. The principal defendants answered, denying that the deed was fraudulent in law or fact. No evidence was taken on either side, and on the 31st of January, 1854, this cause coming on to be heard, by consent, together with the suit above mentioned of Crenshaw, &c., v. Glenn, &c., asking for a receiver and sale, the court being of opinion that the deed of 16th January, 1852, was not made with intent to delay, hinder or defraud creditors, but was intended to protect their interests, and was judiciously drawn to effect this purpose, pronounced a decree dismissing with costs the bill of the plaintiffs, Enders' ex'rs et als.; and directing the receiver of the court to carry out the provisions of the said deed, so far as they are now attainable, by a sale of the property conveyed, and the disbursement of the proceeds of such sale, and of the funds heretofore collected by him, in accordance with the provisions of the deed.

The plaintiffs, Enders' ex'ors et als., appealed from so much of said decree as "dismissed their bill and directed the disbursement of the trust fund, in accordance with the provisions of the aforesaid deed."

Steger, Andrew Johnston and Myers, for appellants.

The deed executed on the 16th of January, 1852, by Glenn & Crenshaw, shows upon its face that it was made with the intent to hinder and delay, and (if necessary for the accomplishment of the grantor's object) to defraud their creditors; and the fact is further proved by the answers of the defendants themselves.

1. The deed recites that the grantors are largely indebted, but have sufficient property to pay their debts, if time be given for the judicious administration of the same. It seems that their creditors were not disposed to give this time; and this recital proves, that to secure this time (delay) was, at least, one of the prime objects of the deed.

2. The deed withdraws the whole of the social and individual property of the grantors from the reach of their creditors, and places it in the hands of trustees selected by themselves, with peremptory instructions from the grantors how to manage the same most judiciously for their creditors, and contains a positive prohibition to their creditors from enforcing the payment of their debts by suits, upon pain of forfeiting all benefits to be derived from the deed. These provi-

sions prove that the interest of the grantors was to hinder their creditors in the collection of their debts, until they had secured the time (delay) which they deemed necessary for the judicious administration of the property.

3. The deed provides that the trustees shall operate the steam saw mill, the planing machines and saws, in all respects, as the said Thomas J. Glenn & Co. might do, but for the deed, for three years from the date of the deed, and so much longer as they may be permitted to do so, unless at the end of two years a majority in value of the creditors should require a sale; and for this purpose, they are invested with power and authority to appoint and compensate agents, to make purchases, contract debts, payable out of the trust fund, to retain and use such of the trust property as may be necessary for the same.

These provisions prove that the grantors, embarrassed to insolvency, and unable themselves longer to carry on their business, intended and determined still to withhold their property from their creditors, and in spite of them to devote it to test the success of their business, which it seems they still believed would prove profitable, notwithstanding it had theretofore proved disastrous to them. In a word, they prove beyond the shadow of a doubt, that the grantors, instead of consulting with their creditors as to the course that would be most beneficial to them, assumed to themselves the province of deciding what would be most beneficial to their creditors, and determined to devote their whole property, first to test the success of a new and hitherto disastrous speculation. And this was first to be done, even though every dollar of the trust fund was sunk by it. If the speculation should prove profitable, it would enure to the benefit of the creditors, of course, as well as to the benefit of the grantors, but if it should prove disastrous, it would be at the expense of the creditors. There can be no doubt, therefore, that the grantors, by these provisions, intended to deprive (defraud) their creditors of their property altogether, if it was necessary to do so, in order to carry on their business. They resolved that their business should be carried on at all hazards, and they determined that their creditors should have none of their property, until their business had been carried on for a time, sufficient, in their judgment, to test whether it would be profitable or not; and *then* only so much as might not have been lost in carrying it on.

4. The deed expressly stipulates that the grantors shall retain the whole of their individual property for two years certainly, and most probably much longer, and take the rents,

issues and profits thereof, to their own use. These provisions clearly show that the object of the grantors in this deed was not an honest and entire dedication of their property for the benefit of their creditors; but that their first and chief object was to carry on their business, in spite of their creditors—believing, no doubt, that its future success would be great, and their creditors, as well as themselves, would be benefitted by such a course.

Their second object was to secure to themselves the enjoyments of their individual property, while the success of their partnership was thus being tested.

Their third and last object was to pay off their debts, provided their business succeeded, or there was anything to pay them with.

That these were the objects intended to be secured by this deed, and the rank and order in which they were arranged in the minds of the grantors, no rational mind can doubt, after an examination of the deed.

Indeed the grantors in their answers virtually admit that these were their objects, and seek to justify them by an appeal to their "convictions" that such a disposition of their property was the best that could have been made for their creditors, corroborated, as they insist, by the actual results of the sales, which have been made of the property.

The protection of the rights of creditors, says Judge Story, must be a fundamental policy of all enlightened nations.—1 St. Eq. p. 342, § 350. Consistently with this wise policy, it cannot be permitted that a debtor should be invested *with the right* to determine what disposition of his property will be best for his creditor. It cannot be tolerated that he shall lock up his property from his creditors, simply because he honestly thinks that it would be unwise and prejudicial to them to sell at once. Still less can it be tolerated that a debtor, by the intervention of trustees, for the benefit of his creditors, shall lock up his property from his creditors, but have the right to embark in hazardous speculations, simply because he may happen to believe that such speculations would extricate him from debt. In a word, the doctrine contended for by the grantors in this deed and established by the decree complained of, is, that a debtor has the right to keep his creditors at bay, until he can make such disposition of his property as he may think most judicious for them, until he has cleared his wood-land farm, and hewed, and sawed, and planed, and sold all the timber. Honesty of motive is, according to this doctrine, the only test of the validity of such a transaction; the only restriction upon the rights of the

debtor, and the debtor's declaration of the character of his motives must be taken as conclusive.

Such a doctrine is utterly destructive of the rights of creditors; and if it were sanctioned, it would effectually prevent the collection of debts, by authorising and inviting debtors (instead of paying their debts,) to embark their property in the wildest speculations. When pressed for payment of their debts, and prevented by creditors from conducting business in *their own names*, and under their own management and direction, unfortunate debtors have but to resort to this sovereign panacea, a deed of trust, and they can effectually silence their creditors, and secure to themselves the undisturbed prosecution of their business. Trustees, selected by the debtors, and vested with unlimited authority to appoint and compensate agents, would not hesitate long in the selection of their agents, or be very parsimonious with regard to their compensation. Deeds of trust, by this doctrine, would be found the readiest protection of debtors and prevention of the collection of debts.

This deed is void by the letter and spirit of the statute of frauds.

The provision requiring the trustees to carry on the business, and authorising them to exhaust the trust fund to accomplish that object, is wholly inconsistent with and destructive of, the avowed object of the deed—to secure creditors. It imposes upon the creditors the unjust, onerous and hazardous burden of carrying on, by agents not selected by themselves, a new and untried business. It confers upon the trustees the power to charge indefinitely the trust fund with future debts, to the exclusion of those intended to be secured by the deed, and forces upon them a course of action which necessarily must hazard the trust subject, if it do not utterly consume it.

In these respects, the deed is unqualifiedly condemned as fraudulent and void, by the following authorities: *Lang v. Lee*, 3 Rand. 410; *Sheppard v. Turpin*, 3 Grat. 373; *Spence v. Bagwell*, 6 Grat. 444; *Bodley v. Goodrick*, 7 Howard's U. S. Rep. 276; *Arthur v. Commercial & R. R. Bank of Vicksburg*, 9 Smedes and Mar., 394; *Farmers Bank v. Douglass*, 11 Smedes and Mar., 469; *Owen v. Body*, 5 Ad. & El. 28; 31 Eng. C. L. R. 254; and *Hyslop v. Clarke*, 14 Johns., 458; *Ward v. Trotter*, 3 Mon. 1.

The deed also reserves to the grantors the positive benefit of retaining their individual property for two years certainly, and the contingent benefit of the speculation forced upon their creditors, while it forbids their creditors from molesting

them in the enjoyment of their private property, upon pain of forfeiting all rights under the deed. In this respect, it is condemned by reason and common honesty.

Morson, August & Randolph, for appellees.*

The decree of the court below was affirmed by a divided court.

*We have not been able to procure the arguments of the appellees.

PARTNERSHIP TRANSACTIONS.

Samuel Livingston, surviving partner of S. & P. Livingston, v. The Pittsburgh and Steubenville Railroad Company.

Where one of two partners subscribes, in the name of the firm, to the stock of a Railroad Company, if the other partner has knowledge of the subscription and of the payments thereon, and does not dissent, it is strong evidence of assent, which, if once given, either before or after the subscription, ratifies it forever.

In the case of a conditional subscription, evidence tending to show a waiver of the condition and a recognition of the subscription as absolute, is competent and relevant, and is properly to be submitted to the jury.

ERROR to District Court of *Alleghany County*.

This was an action of assumpsit, brought by the Pittsburgh and Steubenville Railroad Company against Samuel Livingston, as the surviving partner of the firm of Samuel & Peter Livingston.

The charge of the Court below, (Williams, A. J.,) states all the important facts and points of the case. It was as follows:—

“This is an action to recover the instalments due and unpaid on one hundred and forty shares of stock alleged to have been subscribed to the capital stock of the Pittsburgh and Steubenville Railroad Company by the late firm of S. & P. Livingston, together with the penalty of one per cent. per month from the time the said instalments respectively became due and payable.

By an Act of Assembly approved 24th day of March, 1849, entitled an act to incorporate the Pittsburgh and Steubenville Railroad Company, Samuel Livingston and others were appointed “Commissioners to open books, receive subscriptions, and organize a Company by the name, style and title of ‘the Pittsburgh and Steubenville Railroad Company,’ ” with power to construct a railroad commencing “on the Monongahela river, near Pittsburgh, and running in the direc-

tion of Steubenville, on the Ohio river, to a point on the Virginia State line," subject to all the provisions and restrictions of an act regulating railroad companies, approved the 19th day of Feb'y, 1849. The capital stock of said Company to consist of sixteen thousand shares, with the privilege of increasing the same to an amount sufficient to carry out the true intent and meaning of the act.

It appears from the return of the commissioners, bearing date the 18th of July, 1851, and signed by Samuel Livingston, among others, that books were regularly opened for the purpose of receiving subscriptions, and that more than ten per cent. on the capital stock of said Company, viz: two thousand two hundred and sixty-three shares were subscribed, and the sum of five dollars for each and every share so subscribed paid in by the persons subscribing therefor, among whom S. & P. Livingston are returned as having subscribed one hundred and forty shares.

Letters Patent, bearing date the 22d day of July, 1851, were issued to the subscribers of said stock, constituting them a body politic and corporate in deed and in law, under the name of the "Pittsburgh and Steubenville Railroad Company." The stockholders met on the 21st of August, 1851, and elected a President and twelve Directors. The first meeting of the Board of Directors took place on the 28th of August, 1851. Samuel Livingston, the defendant in this case, was elected one of the Directors, and was present when the Board first met and organized. And as the minutes of the Company show, he was re-elected from year to year, and continued to attend the meetings of the Board, and to act as a Director, until March, 1856.

Peter Livingston died in September, 1855, and this action is brought against Samuel Livingston, as surviving partner of the firm of S. & P. Livingston. In addition to the fact that Samuel Livingston was elected and continued to act as a Director of the Company for a period of more than four years, the plaintiff's counsel contend that the tally list, proxies, books of the Company, and the parol evidence given in this case, show that both Samuel and Peter Livingston were present at the first meeting of the stockholders, and that they voted one hundred and forty shares of stock, standing on the books of the Company, in the name of their firm, and that they paid the first instalment of seven hundred dollars thereon, and a portion of the second, and that both Samuel and Peter, down to the period of the death of the latter, repeatedly, by their acts and declarations, recognized the fact that they were subscribers for one hundred and forty

shares of the stock of the Company, and that in consequence of their said acts and declarations as shown by the evidence, the defendant is estopped from denying his liability as a surviving member of the firm of S. & P. Livingston, for the stock in question.

The defendant denies that he and his deceased brother ever made an *absolute subscription* to the stock of the Company. He alleges that the subscription was conditional, and that he is not liable therefor, because the conditions on which the subscription was made, have not been fulfilled or complied with. The subscription alleged to have been made by S. & P. Livingston, and given in evidence by the defendant, is as follows:

"We, the undersigned, agree to pay to the Treasurer of the Pittsburgh and Steubenville Railroad Company, the sums set opposite our respective names, to the stock of said Company; provided that no subscription shall be considered as due and valid until the sum of two hundred thousand dollars shall have been *bona fide* subscribed on the books of the Company, *and provided the road goes within half a mile of Florence.*" (Signed,) S. & P. Livingston, 140 shares, \$7000. The last proviso is not in the body of the subscription, but is written along the margin of the subscription book, and is proved by the testimony of two witnesses to have been written before the subscription of S. & P. Livingston was made. The testimony of these witnesses is not contradicted or impeached. The jury will determine from the evidence whether the marginal proviso was written before or after the subscription was made.

If the jury are satisfied that it was written before the subscription was made, two questions will then arise in regard to the subscription—

1. Has the first proviso or condition been fulfilled or complied with, as alleged by the plaintiff?

This is a question of fact for the determination of the jury. I cannot instruct the jury that there is no evidence that two hundred thousand dollars have been *bona fide* subscribed on the books of the Company. The jury will determine the fact for themselves from the evidence. If they are satisfied that that amount of stock has been subscribed in good faith, then so far as respects this proviso, the subscription is valid and binding on the defendant, and the plaintiff may recover; but if the evidence does not satisfy the jury that the sum of two hundred thousand dollars has been subscribed in good faith to the stock of the Company, then the subscription would not be binding, and the plaintiff would not be entitled to recover.

2. Has the second proviso or condition been complied with or waived by the defendant?

It is admitted that this proviso has not been complied with, but it might be waived by the parties making the subscription. Have they waived compliance with or a performance of this condition? Waiver of a condition may be shown by evidence of an express agreement to waive its performance, or it may be shown by the acts of the parties amounting to an express waiver, and which would estop them from denying it, by acts which cannot be accounted for or explained on any other hypothesis than that of a waiver. *Where*, for instance, there is a provision in a mortgage that the principal debt shall become due and payable if the interest is not paid as the instalments become due, or within a certain time thereafter, and there is a failure to pay the interest within the time specified, its subsequent receipt by the mortgagee would amount to a waiver of the provision, and estop him from afterwards proceeding to collect the mortgage debt, because the interest was paid within the time provided. The receipt of the interest, without objection, would be tantamount to an express waiver of the provisions. And so as respects the condition on which the subscription in this case was made; if the defendant and his deceased brother, expressly agreed to the route by which the road, instead of being located within half a mile, was laid out between three and four miles from the town of Florence, that would be a waiver of the condition. Or if after the adoption of that route, and notice thereof, they continue to act as stockholders of the company, and to assert their rights as such in respect to the stock in controversy, they must be regarded as having waived the condition on which the subscription was made, and the defendant would be stopped from denying his liability therefor. The Jury will determine from the evidence whether the defendant and his brother, did or did not agree to the route adopted by the Company, in May 1842; or whether they continued afterwards, to act as stockholders with a full knowledge of the route which had been adopted, and did such acts as amount to a waiver of the condition and estop the defendant from denying his liability.

3d. There can be no recovery against the defendant in this case, unless the instalments demanded in this action were called in before suit was brought. If the instalments were called in by the Directors before the bringing of this suit, then the action may be maintained, though notice thereof may not have been given. Were the instalments called in? The defendant contends that they were not, because no amount is specified in the resolutions as they appear, on the minutes.

I am not prepared to say that the resolutions ordering the call of instalments, constituted the only evidence of such call. Undoubtedly it is the duty of the Directors to fix the amount of the respective instalments, and the time of their payment. But this may be shown, as I think, by evidence other than the resolutions of Directors, recorded in the minutes of their proceedings. The fact of the call, the amount of the instalment, and the time of its payment may be shown by any other evidence, which is sufficient to satisfy the minds of the jury that an instalment for a specified amount, payable at a specified time, was in fact called in. Public notice in the newspapers, published by the Treasurer, under the authority of the Directors, would be some evidence of the fact. The stock books of the Company in which the number and amount of the instalments are set down, would be evidence for the consideration of the jury. A payment on account of the instalment would be some evidence against the party paying, of an admission that a call had been made and of notice thereof. As against a Director of the Company, the jury might be disposed to consider it sufficient notice. The first part of defendant's sixth (6th) point is affirmed. The latter part is refused, for the reasons above given. Unless the instalments were actually called in by the Directors before the bringing of this suit, the plaintiff cannot maintain this action, and in order to make the call valid under the provisions of the act, the amount of the instalment, and the time of its payment, must have been fixed and designated by the Directors. But the minutes are not the only evidence of the fact. The jury will determine from all the evidence whether the instalments were called in as required by law, before the institution of this suit.

IV. In order to recover the penalty of one per cent. per month, notice of the call must have been given as required by law. If the calls were properly made, it is not denied that due notice thereof was given."

The jury found for plaintiff for \$9,682 77, whereupon defendant sued out a writ of error.

The case was argued Nov. 22, 1858, by Williams & Sproul, for plaintiff in error; and by G. P. Hamilton & Craft, contra.

The opinion of the court was delivered by Woodward, J.

As this was a suit against a surviving partner, it was necessary for the plaintiff to prove a joint contract.

And, inasmuch as the building of the plaintiff's railroad was not within the scope of partnership objects and purposes, one partner could not make himself the agent of the firm,

for the purpose of subscribing to the stock of the Company. Hence, it was necessary for the plaintiff to prove not only a subscription by one of the partners, but assent thereto by the others.

Assent, however, might be implied from circumstances, and the first question that arises is, whether the evidence which the learned Judge submitted to the jury was such as a jury might reasonably imply from it a subscription by Sam'l with the assent of Peter.

That Samuel subscribed in the name of the firm for 140 shares was scarcely contested, and was conclusively proved by his report as a Commissioner to the Governor, wherein the fact is set forth under his hand and seal.

The organization of the Company, Samuel's active participation therein, the newspaper notices to stockholders, and the election of Directors, were acts of public notoriety which could scarcely escape the attention of Peter, while the payment of instalments out of partnership funds, could only have been made without his knowledge, by fraudulent practices, and such are not alleged.

From all this the jury might well imply assent, for if Peter had knowledge of the subscription and of the payments thereon, and did not dissent, it was strong evidence of assent, which, if once given, either before or after the subscription, ratified it forever.

The evidence was submitted to the jury in proper terms by the Judge. Because it tended to the conclusion sought to be established it was competent and relevant, and it having convinced the jury, the defendant is bound to be satisfied.

Another ground of defence was, that the subscription was conditional.

But the Court instructed the jury that the plaintiff could not recover unless the condition had been complied with or waived. There was a prior question whether the condition, written on the margin of the book, was there when the subscription was made, but this also was referred to the jury.

Of performance of the condition there was no evidence, but of the waiver of it the whole history of the case afforded presumptions of considerable strength. The evidence that tended to affect both brothers with a waiver was fairly submitted to the jury.

And so in regard to the calls. They were published in a Pittsburgh paper, the Livingstons living in Washington Co., and counsel think was necessarily an insufficient notice of the calls.

But the fact that payments were made under these calls

was strongly persuasive of actual notice, especially against a firm of two members, one of whom was acting as a Director. The law did not require publication in the county where the parties resided. Actual notice was found by the jury, and the statutory rate of interest followed as a matter of course.

On all the points stated by counsel the instructions of the Court seem to have been prudent and proper, and under them the case became one peculiarly for the jury. They have decided it, and left very little for review in this Court, nothing indeed that calls for a reversal of the judgment.

The judgment is affirmed.—*Legal Journal*.

GUARDIAN AND WARD.

Chorpenning's Appeal.

A guardian does not contravene the policy of the law which forbids persons standing in a fiduciary relation to property from acquiring title to it, where he purchases at a sheriff's sale of it, having no means of the ward's in his hands wherewith to pay the judgment or purchase the lands.

Where a ward on coming of age settles with his guardian, he is barred from further claim after six years.

APPEAL from the Orphans' Court of *Somerset county*.

This was a proceeding on the petition of Noah Chorpenning against Henry Chorpenning, late guardian of parties represented by complainant.

The history of the case is as follows:

Michael Chorpenning, late of Somerset county, died on the 17th day of May, 1826, leaving a widow, Susanna, and children, Henry, Josiah, Zachariah, Elizabeth, Zedekiah and Noah, and seised of a farm situate in Somerset township, in the county aforesaid, containing two hundred and twenty acres, with the appurtenances. On the 7th day of December, 1831, upon the petition of Susanna, widow of said deceased, Henry Chorpenning, brother of said deceased, was appointed guardian of Elizabeth, Zedekiah and Noah, minor children under the age of 14 years, of said deceased. On the 10th of Sept., 1832, said Henry Chorpenning gave bonds in the sum of two hundred dollars for each of said wards, and was duly commissioned as their guardian, and as such he did, on the 2nd January, 1836, file an account, charging himself with rents received amounting to the sum of \$71 49, and claiming allowances for disbursements amounting to the sum of \$42 83½, leaving a balance in his hands of \$28 55½. The said Elizabeth was taken to the State of Ohio when she was

yet a child, and has continued to reside there ever since. Zedekiah and Noah also removed to Ohio before they became of age, and Noah has resided there ever since. Zedekiah resided in Ohio, until the year 1846, when he enlisted in the army of the United States, went to Mexico, and has not been heard of since. In the month of November, 1839, Elizabeth (then intermarried with Stouch) came from Ohio, and while here, Henry Chorpenning paid her ten dollars, purporting to be in full satisfaction of her share of the money in said Chorpenning's hands, including her share to become due at the death of her mother, and also three dollars and sixteen cents, in full of her share of the rents, as appears from her receipts, and on the 30th of Oct'r, 1843, said guardian paid to Noah Chorpenning fourteen dollars, purporting to be in full of his share and interest in said estate.

On the 26th Jan'y, 1820, Martin Phillipi instituted an action of debt against John Witt and Conrad Schultz, administrators of the said Michael Chorpenning, dec'd, and on the 17th Oct'r, 1829, obtained a judgment therein for \$649 77. On said judgment the following payments were made, viz: 3rd April, 1830, \$140; 1st April, 1832, \$100; 1st April, 1833, \$100; and 1st April, 1834, \$100. On the 31st of August, 1833, a *fi. fa.* was issued on said judgment, upon which *fi. fa.* the sheriff returned, "Lands levied, inquisition held, and property condemned. Condemnation of property agreed to by Henry Chorpenning, guardian." On the 11th Oct'r, 1833, a writ of Vend. Exp. was issued, which was returned, "writ not executed;" on the 6th December, 1834, sale and condemnation set aside, and on the 29th December, 1834, another writ of Vend. Exp. was issued, upon which the sheriff returned, 2d Feb., 1835, "Property sold to H. Chorpenning for \$700." On the 1st of May, 1840, Jonathan Knepper, high sheriff of Somerset county, made and acknowledged his deed to Henry Chorpenning for the said farm so levied and sold as the property of the said Michael Chorpenning, dec'd, in the hands of his administrators; and the said Henry Chorpenning and his wife, on the 27th May, 1840, conveyed said farm to his son Simon for the consideration of \$2,000.

On the 28th Feb'y, 1835, the said Henry Chorpenning obtained a judgment by confession from the administrators of said Michael Chorpenning, dec'd, for \$152 70, with interest from the 14th March, 1834, for what purports to be a payment in part of claims held by Wm. Shunk against said deceased.

On the 10th of Nov., 1856, the aforesaid Noah Chorpenning presented his petition to the Orphans' Court of said

county, setting forth some of the foregoing facts, and praying the court that the said Henry Chorpenning be ordered to file a more full account of the trust confided to him and of the moneys received by him belonging to his said wards, which petition was granted and order issued thereupon; said Chorpenning filed an answer to which it was excepted, that he did not charge himself as guardian, with the rents, issues and profits of the said farm, and therefore the said court ordered him to file an account in the Register's Office, which he did on the 27th Nov. 1857, to which account exceptions were again taken, that he did not charge himself with the share of the rents, &c., due to his said wards, nor with their share of the proceeds of his sale to his son Simon, after payment of debts.

Upon hearing the exceptions, the court appointed an auditor to state an account, and report the facts.

At the several hearings of the parties by their counsel, before the auditor, it was contended on the part of the said heirs, that said Henry Chorpenning having purchased the lands owned in part by his wards by descent from their father, was bound to account to them, not only for the rents, issues and profits thereof while the same was in his possession, but also for their share of the nett money raised by the sale to his son Simon, he having bought said farm while he stood in the relation of guardian to the said Elizabeth, Zedekiah and Noah. To this it was answered on the part of the said respondent, that the said Elizabeth, Zedekiah and Noah were barred from recovering anything. 1st. Because they had instituted an action of ejectment for said land in the Common Pleas of said county and failed to recover. 2. Because they have given their receipts in full for all moneys due them from the estate of their father in the hands of said Chorpenning; and 3d. Because Henry Chorpenning not being a party to the sale of said land, and it being a judicial sale, he was free and clear to buy as any other person, although he was guardian at the time.

These propositions of respondents' counsel the auditor negatived, and stated an account showing a liability of H. Chorpenning to each of his wards of \$478 95. The court refused to confirm the report, but amended it as follows:

"Due Zedekiah the sum of	\$27 32
" Elizabeth "	13 13
" Noah "	16 22

At the death of the widow, Zedekiah, Elizabeth and Noah Chorpenning will be entitled each to the one-sixth of the \$44 02 secured to widow during her life."

The complainants appealed to the Supreme Court.

Forward and Gaither for appellants cited 2 Kent 229. marg. 9, page 241—*Keech vs. Sanford*, (select cases,) 6 Vez. 625—8 Vez. 337—2 Johns Ch. R. 252—10 Vez. 381, 2 Whar. 63, 7 W. 472—Act of 24th Feb'y 1834, sec. 35 and 36, and Act of 29th March, 1832, sec. 32.

W. J. Baer for appellee, admitting the correctness of the elementary principles cited by appellants' counsel, still maintained that the guardian had discharged every duty incumbent upon him and was therefore not further accountable.

The opinion of the court was delivered Nov. 29th, 1848, at Pittsburg, by

THOMPSON J.

The doctrine that a party will not be allowed to purchase and hold property for his own use and benefit, when he stands in a fiduciary relation to it, if contested by the party entitled as *cestui que trust*, is indisputable, and the rule is inflexible, without regard to the consideration paid, or the honesty of intent. Public policy requires this, not only as a shield to the parties represented, but as a guard against temptation on the part of representative. The relation, however, must be one in which knowledge, by reason of the confidence reposed, might be acquired, or power exists to affect injuriously the interests of *cestui que trusts*, or advance that of the trustee. The reason of the law is its life, and unless some advantage might be gained by reason of the relation—the principle does not apply. The doctrine on this subject was elaborately discussed by this court in the case of *Beeson vs. Beeson*, 9 Barr, 279, and held as stated above, and in many cases before and since.

The material inquiry here is, whether the case of the appellee is within this rule. He was guardian of three of the heirs when he purchased the land in 1835. He had in his hands no means of theirs wherewith to pay off the judgment or purchase for them, and none in expectancy. The sale was made by the sheriff on a judgment obtained against the administrators, and although, to save costs— he waived inquisition, yet, so far as the disposition of the property was concerned, the law divested him of the control of it, and devoted it to a purpose with which, as guardian, he was in no way connected, namely, to the payment of the debts of the intestate. It is not easy to see, in this situation of affairs, how he could have possessed any knowledge in regard to the sale of it advantageous to himself or injurious to his wards, for it was to be disposed of at public vendue to the highest bidder. And certainly control over the sale is not to be presumed, as

it was to be performed by a public officer. The presumption is to be the opposite of this. The sheriff was the instrument of the law in the matter, and his acts and doings, unless shown to be wrongful or erroneous, are to be taken as within the strict requirement of it. The appellee was entirely powerless in his capacity of guardian in relation to the land. He had neither money nor influence as such. It may be conceded that he stood very near the line of disability as a purchaser for his own interest, but still outside of it, if the reason of the law is to govern. Authority, however, sustains his position. In *Provost vs. Gratz*, Peters C. C. Rep., 378, it was said per Washington J. "I know of no principle of equity, however, which will inviolate the title of a trustee to land, which the law has taken out of his hands, and which he purchased from one appointed by the same authority to sell it," and the same learned judge adds, "that it is precisely like the case of an executor who purchases at a Sheriff's sale the personal property of his testator seized under execution." And in *Fish vs. Sorles*, 6 W. & S. 18, after citing the above authority, it is said by Kennedy J. "The reason which prohibits a trustee from purchasing at his own sale does not apply to such a case," a case in principle very similar to this. We think the appellee is not therefore within the rule invoked to render him answerable to account for the advance in the value of the property, on the score of public policy.

Nor do we think there was anything whatever in the case to render him accountable on the score of actual fraud, or such as to turn the purchase to the advantage of the cestuys que trust. There is no evidence that he had funds of theirs in his hands wherewith to save the property from sale or to buy it for their benefit. If such had been the case and he had withheld it—let the land go to sale and bought it in for himself, he might have by this means been required to account. A trustee is bound to fidelity to the interests of his trust, and will not be permitted to make profit by means of his relation. If he has the power and means, duty would require him to act for the benefit of the trust. The fact of waiver of inquisition would not without more be evidence of such bad faith as to produce the effect contended for. He was an heir himself, and had a right to see that the property was not squandered in costs. Besides it appears that the land could not have extended, for the rental required would have been over one-third more than the proof shows that the land would have rented for at the time. Nor was there any like power in that other suggestion that he might have applied to the Orphan's Court to stay execution, and procured an order that

the administrators should sell. Even if such prayer was certain to have been granted, it is not alleged that the land would have brought more money in that way of disposing of it than it did at Sheriff's sale. And unless it were so shown it will not be presumed that the guardian gained anything by omitting so to act, even if it had been within his power and duty to do so. The Court committed no error in overruling the auditor's report, charging the appellee with the proceeds of the sale of the land.

The appellants, Noah and Elizabeth, had no case against their own receipts, there being no circumstance of fraud shown on part of the appellee in obtaining them. They were given on payment, after each of them had arrived at age; and there is not a word of evidence to impeach the fairness of the transaction. An acquiescence of 13 years in one case, and 17 in the other after the date of the receipts, is too long to cherish the hope of redress in overhauling the transaction. But they were barred by the statute of limitations Bone's Appeal, 3 Casey 492. Notwithstanding this, the court below overruled the auditor's report, and decreed in favor of the appellants for a small amount. The appellee does not appeal from this decree and we will not disturb it.—*Ib.*

USURY.

Corless & Co. v. Estes.

Where a commission merchant in New York, according to the custom of the business in that city, charged his correspondent one and one half per centum upon money advanced, as a commission for making the advance, and interest upon the money from the time of the advancement, it was *held*, that this being done without any corrupt intent, and being also held by the courts of that State not to be usurious, must be so held here, the law of the place of contract being conclusive upon that point.

That such a transaction is wanting in the essential element of a usurious contract, whereby it is made void *in toto*; that is, the corrupt intent to reserve and to take above the legal rate of interest. That being the form of the statute in New York, a contract cannot be brought within it without the concurrence of the minds of the parties to the contract in this corrupt intent.

But where the statute, as in this State, merely requires the excess above the legal rate of interest to be expurged in assessing the amount due, such a claim, if the transaction occurred here, must certainly wear very much the aspect of one reserving an excess of interest. For if the party can charge a low commission for advancing money, in addition to the legal interest, he may equally well charge a higher one, and it will thus become a direct violation of the terms and of the essence and spirit of the statute. For so far as the money advanced is concerned, it is a loan, and nothing more, in fact, whatever disguise it may assume in the course of its accomplishment. It was so held in *Burton v. Blair*, 23 Vt. R. 151.

PROMISSORY NOTE—TRANSFER BY BANK.

Bruce v. Hawley.

The provision of the statute prohibiting banks from transferring notes or other securities, belonging to or payable to the bank, has exclusive reference to securities taken in the ordinary course of discount. It does not preclude the bank from transferring a note or bill payable to the order of the maker, and negotiated to the bank in the ordinary course of business, if such note or bill be transferred in payment of a debt due from the bank, or in any other way, *bona fide* and for value.

INTEREST ON BOOK ACCOUNTS.

Morrison v. Martin.

Interest is recoverable upon book accounts after they fall due, and may be allowed upon the yearly balances, when the account consists of different items, occurring at different times.

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MAIL ROBBERY BY SLAVE.*

United States v. Amy.

In the Circuit Court of the United States, for the Fourth Circuit, Virginia
District: May Term, 1859, held at Richmond, Virginia, before
Chief Justice Taney and Judge James D. Halyburton.

Section 22nd of the Act of Congress, passed March 3rd, 1825, provides
that if "*any person* shall steal a letter from the mail, the offender shall,
upon conviction, be imprisoned not less than two nor more than ten
years." **Held:**

That the word *person* is used in the Constitution of the United States to
describe slaves as well as freemen, and that the Constitution recognises
slaves both as persons and as property.

That when the word *person* is used in an act of Congress, the act may be
construed as including slaves, unless there is something in the object
and policy of the law, or in the provisions with which the word is asso-
ciated, which manifestly indicates that it is used in a different sense, and
was intended to apply to persons who are free.

That there is nothing of this character in this act, and therefore it includes
slaves.

That the act thus construed, is constitutional.

That the clause in the 5th amendment of the Constitution, which declares
that private property shall not be taken for public use without just com-
pensation, cannot, upon any fair interpretation, apply to the case of a
slave who is punished in his own person for an offence committed by him,
although the punishment may incidentally affect the property of another,

* We give unusual space to the report of this case, in view of its novelty
and national interest and importance.—[Ed.]

to whom he belongs. The clause applies to cases where private property is taken to be used as property for the benefit of the government, and not to cases where crimes are punished by law.

That from the nature of our government, the same act may be an offence against the laws of the United States, and also of a State, and be punishable in both; yet in all civilized countries it is recognized as a fundamental principle of justice that a man ought not to be punished twice for the same offence, and if the slave Amy had been punished for the larceny in the State tribunal, the Court would have felt it to be its duty to suspend sentence, and to represent the facts to the President, to give him an opportunity of ordering a *nolle prosequi*, or granting a pardon.

The slave Amy, the property of Samuel W. Hairston, of Patrick county, Virginia, was indicted for stealing a letter from the mail at Union Furnace post-office in that county, under section 22nd of the act of Congress, passed March 3rd, 1825, which provides that "If any person shall steal a letter from the mail, the offender shall, upon conviction, be imprisoned not less than two, nor more than ten years." At the trial before Judge Halyburton, on the point being suggested by the defendant's counsel that a slave is not a "person" amenable to the act,—His Honor said, the point was one of great novelty and importance, and that as the Chief Justice was shortly expected, it must be adjourned for argument and consideration until his arrival. The point was therefore overruled, and the case proceeded in, with the understanding that the question would be argued and decided upon a motion for a new trial in the event of conviction. The slave was convicted upon the evidence, and accordingly on the arrival of the Chief Justice, the motion for a new trial on the reserved point was argued before the two Judges.

John Howard, (of Howard & Sands), for the owner of the defendant, Amy, contended,

I. That as there was nothing in the act specially pointing to slaves, it applied, *prima facie*, only to "persons" known and acknowledged in the law generally as persons having legal rights and responsibilities, who could be tried and legally punished in the manner provided by the act, and under the usual forms of the law as administered in the United States Courts; that a *slave* is not such a legal "person," and is not within the meaning of the act, a slave not being, in ordinary legal contemplation, a *person*, but *property*; and he cited the constitution of the United States, construed by the Supreme Court of the United States in *Dred Scott v. Sanford*, 19 Howard, 407-8, 411, 425-6, as recognizing slaves only as *property*, and the Supreme Court of Appeals of Virginia as deciding in *Bayly v. Poindex*.

ter, 14 Grat. 132, (see authorities there collected,) and other recent cases, (*Williamson v. Coalter's ex'or.* 14 Grat. 394, and *Fox v. Fox's ex'or.*, not yet reported) that a slave has no legal right or capacity whatever—that he is not a legal *person*, but a *thing*; that it was a well settled principle of construction that all the parts of a statute must be taken together, and the whole construed as one law; and that in accordance with these views, the different sections of this act of Congress in respect to offences against the post-office, clearly showed that slaves were never intended to be embraced therein; since sometimes the punishment is merely a pecuniary fine, varying from \$10 to \$2,000, and sometimes imprisonment, sometimes both; that it was impossible, in a legal sense, either to *fine a slave*, or to *deprive him of liberty*; that a slave has neither property, nor liberty, to be taken away, his legal character, so to speak, consisting in the absence of all the rights of property and liberty, so that a judgment against him, depriving him of either, to any extent, would be a mere legal nullity and absurdity.

The act of Congress should not be construed as contemplating so palpable a judicial solecism and impossibility. But if the act be construed as including slaves, a still more striking incongruity would follow. The Constitution of the United States provides that “the trial of all crimes, except in cases of impeachment, shall be by jury,” which means *a jury of one's peers*. Such was the sense in which the term was used in the constitution. In that sense it was immemorially understood at the common law, from which it was taken; for even in *magna charta* (in this respect the prototype of our constitution,) it is expressly provided that no man shall be deprived of his life, liberty, etc., unless by the judgment of his peers, *nisi per legale iudicium parium suorum*, etc., or in the language of Judge Story, in his Commentaries on the Constitution, citing Coke's Institutes and Blackstone, “a trial by the country, which is a trial by a jury, who are the peers of the party accused, being of the like condition and equality in the State.” 2 Story on Cons. U. S. 425.

If, therefore, slaves are included in this act of Congress, and are to be tried according to the Constitution of the United States, they must be tried by *a jury of their peers, their equals, slaves like themselves*; and thus would be presented the novel and anomalous spectacle of twelve negro slaves, subpoenaed from the field or the factory, presided over by the learned Judges of the Court, and addressed by the District Attorney as “Gentlemen of the Jury”—slaves solemnly determining the legal rights of their *fellow-slaves*, who, in contemplation of law, have *no rights*, and disposing of the lawful property of their masters, themselves

but mere *property* like that of which they dispose. Such solecisms and absurdities as these plainly enough show that slaves never were intended to be included within the provisions of this act of Congress.

II. If, however, they were intended to be so included, then the act was unconstitutional, inoperative and void, as to them. The principles recognized and established by the Supreme Court of the United States in *Dred Scott* against *Sanford*, clearly apply to this case. There, it is true, the only matter in issue was whether an emancipated negro, whose ancestors were brought from Africa and sold into this country as slaves, is a citizen of a State, in the sense in which the word *citizen* is used in the Constitution of the United States; and the court decided that he is not, and that therefore he cannot sue as a citizen in the United States Courts. It is also true that the Court expressly stated that they were by no means prepared to say that there are not many cases, civil, as well as criminal, in which a Circuit Court of the United States may exercise jurisdiction, although one of the African race is a party—that broad question was not before the Court. Nor is that broad question now before this Court. The question is, not whether the Court may not exercise jurisdiction in any case in which a freed negro is a party; but whether it has jurisdiction in a case in which a *negro slave* is made a party. Aliens, citizens of the different States, not naturalized as citizens of the United States, and free negroes, all have their respective legal rights and obligations—they are *sui juris*—and may, or may not, be held sueable, or responsible in the civil and criminal courts of the United States. But with *slaves* it is different. They have no legal rights nor obligations. They can neither sue nor be sued. They are *punishable*, indeed, by the statute law of the State, and only by the positive statute law, since African slavery is unknown to the common law, as was decided by Lord Mansfield in *Somerset's* case, 20 How. St. Tr. 1, and by the General Court of Virginia, in *Turner's* case, 5 Rand. 578, and as has been decided by the Supreme tribunals of other States of the Union; they are punishable by the statute law; yet, in a mode, and to an extent, that recognizes no rights of any character in themselves, but on the contrary, demonstrates the absolute legal dominion and supremacy of the master race and the absolute subjection of the slave.

Slaves certainly could not be sued in a civil action for damages in the Circuit Court of the United States—it is difficult to see how they can be made defendants to a criminal prosecution, the *object of which is to enforce a fine, or the forfeiture of property, or freedom*, to any extent, or in any manner. Congress

has passed no positive act to that effect, and it has no authority to pass any such act. It would be to create rights and responsibilities for the slave which he cannot possess, and could not exercise and fulfil. It would be to invade the peculiar province and jurisdiction of the several States, in respect to a matter purely of domestic concern, at once of the greatest delicacy, and of the greatest magnitude and importance.

The reasoning of the Supreme Court in the case of *Dred Scott v. Sanford* abundantly supports these views. The court say that the only two provisions of the Constitution of the U. S., which point directly and specifically to the negro race as a separate class of persons, show clearly that they were not regarded as a portion of the people or citizens of the government then formed—the one clause authorizing their importation as slaves by the several States until the year 1808, and the other providing for the return of fugitive slaves to their masters; “that these provisions show conclusively that neither the description of persons therein referred to, (African negroes,) nor their descendants, were embraced in any of the other provisions of the Constitution; for that certainly these two clauses were not intended to confer on them or their posterity the blessings of liberty, or any of the personal rights so carefully provided for the citizen.”—19 Howard, p. 411. “The only two provisions which point to them, and include them, treat them as property, and make it the duty of the Government to protect it. No other power, in relation to this race, is to be found in the Constitution; and as it is a Government of special, delegated powers, no authority beyond these two provisions can be constitutionally exercised. The government of the United States had no right to interfere for any purpose, but that of protecting the rights of the owner, leaving it altogether with the several States to deal with this race, whether emancipated or not as each State may think justice, humanity, and the interests and the safety of society may require. The States evidently intended to reserve this power exclusively to themselves.” 19 How. p. 425. Such is the language of the Court, and therefore the law of the land, expounded by its highest Constitutional tribunal. Of course then, *negro slaves* are not entitled to any of the personal rights secured to the citizen; nor can they be subjected, by the Federal Government, to any of the civil or legal responsibilities of the citizen, since it has nothing to do with *slaves* except to protect the rights and property of their owners in them *as slaves*. The State Governments take care of their municipal discipline and control. Hence, any act of Congress, which contemplates and necessitates, in its administration by the Courts of the United States, the exercise by the slave of any of the personal rights of the

citizen, or which seeks to subject the slave to any of the civil or legal responsibilities of the citizen, or which attempts to treat or to punish him as a *free man*, who is liable as such to the process and coercion of the Courts, is clearly unconstitutional, nugatory and void so far as he is concerned. A slave has no such rights to exercise or claim, and no such responsibilities can be thrust upon him—the creation of a civil or legal person out of a *thing*, the investiture of a *chattel* with the *toga civilis*, may be an achievement of Imperial Power, but it is beyond the compass of an American Congress. Congress must first emancipate the slave, before it can endow him with the rights of a citizen under the Constitution, or impose upon him the responsibilities of a legal person, or compel him to pay money, or part with liberty. Now the act under which the slave Amy is prosecuted, contemplates, implies and necessitates in its administration by the courts, the exercise by the party prosecuted of whatever right a citizen may claim under the Constitution, and the 5th and 6th articles of the amendments thereto, prominent among which is the right of trial by jury, and the act cannot be enforced without compelling the party prosecuted to pay money, or part with liberty, or do both, neither of which things can be done by the slave, and neither of which has the Federal Government power to endow him with the capacity to perform or to compel him to perform. The act has no application to slaves; but if it is to be construed as including slaves, then it is as to them, clearly unconstitutional, null and void.

It is unconstitutional and void for the further reason that in condemning the slave to imprisonment, it deprives the master of the labor and services of his slave during the term of imprisonment, and thus takes “private property for public use without just compensation”—for the slave is punished for the public benefit, as a warning and example to offenders. On this account, in Virginia, a slave who is hung, or transported, is paid for by the State according to his value.

The whole management and control of slaves, their discipline, government and punishment is and ought to be, a matter purely of State police and municipal jurisdiction, the domestic concern of the several States, with which the Federal Government has no right or business to interfere. *It is a subject too sacred for the touch of Federal power.* In the very language of the Supreme Court, the States “intended to reserve this power, *exclusively to themselves*,” and it will be an evil day for Virginia and the Southern States when the Federal Government shall assume the authority to seize and carry away our slaves to the District of Columbia, or the Northern States, for the alleged purposes of punishment, or otherwise. Nor is there any ne-

cessity in this case to institute so dangerous a precedent and innovation. This slave may well be tried, and if guilty, properly punished under the State laws, for larceny of the letter and its contents, and that is the course with her which ought to be pursued, and to which, her owner, Mr Hairston, would interpose no objection; she ought to be whipped and sent about her business, and not carried beyond the jurisdiction of Virginia, to Washington, there to sleep or sicken in imprisonment, from two to ten years, to the total loss of her services to her master during that time, and then to be turned loose among persons perhaps but too ready to facilitate her escape to the North. The master had no guarantee that she would ever be returned to him. It was not the duty of the Marshal to return her; it was not the *duty* of the keeper of the Washington Penitentiary; no provision was made for it in the act; and this fact of itself, shows that the act was never intended to apply to slaves, and that if it was, it is unconstitutional.

John M. Gregory, District Attorney for the United States, resisted the motion for a new trial.

1st. Because the trial had been fair, the evidence clear to establish the guilt of the prisoner, beyond doubt and beyond cavil.

2nd. The prosecution was under the 22d section of the act of Congress, approved March the 3rd, 1825, entitled "an act to reduce into one the several acts establishing and regulating the Postoffice Department," 4 Statutes at Large, p. 108. There are four counts in the indictment; in each the accused was charged with a violation of the provisions contained in this 22d section, and the jury found a general verdict of guilty against her. No person who heard the evidence can doubt that the prisoner committed the offence of which she stands charged. But the counsel for the prisoner insists that the court ought not to pass judgment upon the prisoner, because she is a slave, "and as such not a legal person in the contemplation of the act of Congress, a slave not being in ordinary legal contemplation, a person, but property." It is true that slaves are property; but it is equally true that they are recognised in all modern communities where slavery exists as persons also. The Constitution of the United States recognizes slaves as persons, and they are also recognized as persons by several acts of Congress. They are recognized as persons in every State in the Union, and punishable as persons for the commission of offences in violation of the penal laws. How then can it, with any correctness, be said that a slave is not such a legal person as is amenable to the act of Congress under which the prisoner has been tried and found guilty by the jury? The facts stated are so plain and well

known to the court, that I deem it would be but a useless waste of time to refer more particularly to authorities to sustain them. I cannot prove more plainly that the prisoner is a person, a natural person at least, than to ask your honors to look at her! There she is. She is beyond doubt a human being, and it is not pretended she is not of sound mind. It is submitted that although the motion for a new trial has been sustained with much earnestness and ingenuity it must be overruled, and the prisoner sentenced, under the law, to punishment by the court.

John Howard, in reply.

No question is made as to the guilt of the prisoner, upon the evidence, if a slave be amenable to this act of Congress.

The defence urged is purely a legal and technical defence; but it involves principles of Statutory construction in respect to slaves, of vast practical importance, and questions of Constitutional right in respect to Federal jurisdiction over slaves, of equal novelty, delicacy and magnitude.

1. Are slaves within the act?
2. If so, is the act Constitutional?

These are the grave questions to be considered and decided.

1. Upon the first point it is said that slaves are certainly within the act, because although they are *property*, yet they are *persons also*; that they are recognized as persons in all modern communities in which slavery exists; that they are recognized as persons by the Constitution of the United States and by several acts of Congress, (of which, however, no instance was furnished), and by the laws of the several States of the Union, and are punishable as persons for the commission of offences in violation of penal laws. No references were deemed necessary—and none certainly were needed—to sustain these positions. And, as if in triumphant and conclusive proof that a slave is a person, a natural person, at least, a human being, and therefore within the act, proof is made of Amy in open court!

This is the argument—the whole argument for the United States. It is easy to see how far short it comes of proving the case of the Government—that slaves are persons within this act; for it entirely overlooks a broad, radical and most important distinction, which is the basis of all our civil and criminal jurisprudence in respect to slaves. It confounds the legal character and attributes of the African slaves in the United States, who are purely *chattel slaves*—with their character and attributes as *natural persons*.

This great mistake into which, as it is humbly submitted, the learned counsel for the United States has fallen, is a mistake in which it would seem he has the company of men of high

reputation. Even so philosophic a thinker as Prof. Bledsoe, who was bred to the law and is distinguished for the accuracy of his intellectual perceptions, has, if his language be not misunderstood, fallen into the same error. (Lib. and Slavery, p. 94-102.) And Mr. Cobb, the learned and intelligent author of the only respectable legal treatise upon Southern slavery, would seem, perhaps inadvertently, to have yielded his assent to the same misconception of the subject, although in other parts of his valuable work, as will presently be seen, he fully sustains the view upon which the defence of this case, on this point, is based. Cobb on the Law of Slavery, vol. 1, p. 83.

It is natural, perhaps, or at least not a matter of surprise, that inaccurate and conflicting ideas should be current in regard to a subject, of which the philosophy and the jurisprudence are alike in so inchoate and undeveloped a condition. But it is submitted, with great deference, that a few plain and simple general principles of universal assent, would seem very clearly to point out the true legal character and attributes of our slaves, and to constitute the solid foundation of the only consistent and intelligent system of law in respect to the relations of the free and the enslaved race. It is admitted that the African slaves among us have no voice in the Government, Federal or State; that they were not parties to the establishment of either; and that they have no agency in the making, administration and execution of the laws thereunder. It is admitted that we must now take it as *res adjudicata*, however well it might be doubted, if an open question, that they were unknown to the Common Law; and therefore that all the law which is applicable to their condition is statute law. It is admitted that the parties to the State and Federal Governments, hold and exercise the sovereign power of the political communities of the U. States; and it is further admitted that in respect to slavery within its own limits, each State government is supreme.

These facts demonstrate that the *status* of the slave is a matter exclusively of State jurisdiction and of positive Statute law. And we have but to inquire what is the *status* of the slave by the statute law of each of the States in which he exists? The direct answer is, that by the statute law of every State in which he exists, he is made absolutely and purely a *chattel*; and that he has no legal or civil rights or capacities whatever, and therefore no corresponding responsibilities as a legal or civil person. From the very law of his condition, thus expounded, the inference is at once obvious and inevitable, that he cannot be subjected to the pains and penalties which are exclusively applicable to legal or civil persons. Accordingly we shall find that in each slave-holding State of the Union, there is virtually a separate

code of penal laws for slaves ; that, as was well said by the Court, per *Gaston, J.*, in the *State v. Manuel*, 4 Dev. and Bat. 20, "*Slaves are not, in legal parlance, persons but property ;*" that in the construction of general statutes by the State Courts, slaves are held not to be included, unless specifically mentioned in the act, or embraced by necessary implication ; and that when the penalties of the act are of such a character that civil persons, persons having civil rights and capacities, alone can suffer them, slaves are held by that circumstance to be necessarily excluded from its provisions and not to have been within legislative contemplation. And in the absence of any thing to the contrary, nay indeed, with the strongest considerations demanding their recognition, no reason is perceived why the same rules should not hold in construing this act of Congress, an application of which, in a case of the first impression, is sought to be made to the same subject-matter of legislation.

Such, briefly, is the view of the legal *status* of slaves, and of the canons of interpretation, upon which, on this point, the defence relies.

Now, obviously, it is no answer to say that "slaves are not only *property*, but *persons also* ;" that they are "recognized as persons in the Constitution of the United States," and are "punished as persons by the penal laws of the several States," and must therefore be held to be included in this act. For it assumes that slaves are "persons" in some legal sense that is inconsistent with the fact of their being absolute property ; that they are referred to in this act of Congress as persons, if at all, in the same sense in which that word is used in the Constitution, and that they are indicated in the act, by the same or by equivalent words of description, as are used in the clauses of the Constitution in which they are included ; and that in the penal laws of the several States, slaves are generally embraced under the word "persons," without reference to the character of the offence, or to the kind or degree of the punishment imposed. In other words, it takes for granted the points in dispute—begs the whole question !

When it is said that our slaves are not only *property*, but *persons also*, the proposition, rightly understood, is undoubtedly true. It is true that the negro did not cease to be a *natural person*, a human being, by becoming a slave, and he may be punished as *such by fit penalties*. The very idea of a *slave* is a human being in bondage. A slave is, and must, of necessity, continue to be, a natural person, although he may be a legal *chattel*, or whatever may be his relations to the law. And it is evidently in this sense that he is "recognized" as a "person," in the Constitution of the United States. Thus in the clause respecting

the return of fugitive slaves, he is called "*a person held to service*,"—that is, a *slave*. So in the clause authorizing their importation, until the year 1808, slaves are designated as "*such persons* as any of the States now existing shall think proper to admit." And so in the only other clause in which allusion is made to them—the clause regulating the ratio of federal representation and direct taxation, slaves are spoken of as "*three-fifths of all other persons*" than "*free persons*." It is well known that these circumlocutory forms of expression were all adopted merely to avoid the use of the word *slave* in the Constitution—which, it was thought, would be a blemish upon the face of that instrument, and "*which had been declined*," as Roger Sherman said, "*by the old Congress (of the confederation), and was not pleasing to some people.*" 3 Madison Papers, p. 1427.

They were, each, used as a euphemism, instead of the word *slave*, and each means a *slave* and nothing more. That was the sole office and import of the expression used in each instance. The first describes him as a *person held to service*; the second as a *person*, the subject of the slave-trade, a *person* imported for sale, *as a chattel*; the third, as a *person* who is not a "*free person*," that is, who is a *slave*. Certainly nothing is expressed, or implied, by these *descriptions*, in respect to the legal character or relations of the *slaves* so described, except a recognition, direct and *emphatic* indeed, of *slaves as property*; and such was the construction put upon these forms of expression by the Supreme Court in *Dred Scott v. Sanford*, as will be seen. The Court seem to have overlooked, or to have regarded as of no significance in this aspect, that clause of the Constitution in which, in fixing the ratio of representation and taxation, slaves are described as "*other persons*" than "*free persons*;" and they say in respect to the other two clauses above quoted, "*These provisions show conclusively that neither the description of persons therein referred to, (slaves), nor their descendants, were embraced in any of the other provisions of the Constitution; for that certainly these two clauses were not intended to confer on them, or their posterity the blessings of liberty, or any of the personal rights so carefully provided for the citizen. The only two provisions which point to them, and include them, treat them as property, and make it the duty of the Government to protect it. No other power in relation to this race. is to be found in the Constitution; and as it is a Government of special, delegated powers, no authority beyond those two provisions can be Constitutionally exercised.*" 19 How. 411, 425. It is perfectly clear, therefore, that the sense in which the slave is described in the Constitution of the United States, as a "*person*," is merely as a *natural person*, and not

as a *legal*, or *civil person*—a person having legal, or civil, rights and capacities, and obligations corresponding thereto. And this is obviously the sense in which the slave is recognized as a “person” in all the laws of the several States of the Union, in which he is included. It is in this sense in which he is spoken of in all the adjudications of the Supreme tribunals of the States in respect to him, or his legal condition. Thus in the case of *Bayly v. Poindexter*, before cited, he is described as “a *person* whose *status* or condition, in legal definition and indentment, exists in a denial to him of the attributes of any social or civil capacity whatever.” 14 Grat. p. 198.

Now, if this is all that is meant by saying that a slave is not only *property*, but a *person also*, no possible objection can be made to the statement. On the contrary, it is perfectly true. But it is fatal to the argument of the Government in this case. For if slaves are recognized in the Constitution of the United States only as natural persons, and in the laws and adjudications of the several States in the same sense, and we are therefore to recognize them in that sense in construing acts of Congress, then this act of Congress obviously cannot be construed as including slaves, in so far as its penalties apply only and exclusively to *civil persons*. And it would seem to be singularly unfortunate that recourse should have been had to the use of the word “person” in the Constitution of the United States, in illustration of its meaning in this act of Congress, so far as slaves are concerned. For the word “person” in that instrument is held to include slaves, only when words of description are added, such as “persons, *held to service*,” or “*such persons as any of the States existing shall think proper to admit*,” &c.; and we have the conclusive authority of the Supreme Court for saying that they are not included in any other clauses of the Constitution than in those in which they are thus specifically described. If, therefore, we are to hold slaves to be included in this act of Congress, because the word “person” is used in the Constitution as including them, analogy and common sense alike require that the act be construed to include them only in those clauses in which they are specifically described or alluded to in like manner as in the Constitution itself. And no such clauses are to be found in the act. Nay, not only so, but on the contrary, as if to exclude the possibility of including slaves, penalties are provided in each clause, such that civil persons only can suffer, and from which slaves are exempt by the very law of their condition.

Now this view would appear thus to be conclusive of the case for the defendant, even upon the ground taken by the counsel for the United States. But it seems to be thought that slaves

are something more, in legal contemplation, than *chattels* and "natural persons;" that they are endowed with some sort of vague, undefined civil rights and capacities, which authorizes the Federal Government to subject them to responsibilities as legal or civil persons. It is admitted that they are *chattels*,—*property*, in its strictest sense; yet it is said they are "*persons also*." But if any thing more, or other than this be meant, *that slaves are natural persons, although chattels*,—if it be meant that a slave is at the same time *property*, and separate and apart from and beyond this, a legal or civil person, endowed with civil rights or capacities, and subject to correlative responsibilities, as a legal or civil person—the proposition, so far from being true, is pregnant with its own refutation—it shows upon its face, indeed, an inherent, necessary and self-evident absurdity and contradiction in terms. The simple and conclusive answer to every assertion of this legal solecism and impossibility, is the question, if the chattel slave have legal or civil rights or capacities of any kind, or to any extent, where are his legal remedies to enforce them?—or what his opportunities to illustrate their exercise? Is he known to the Constitution, State or Federal, except as a *chattel*? In what part of the law are those rights enumerated or defined—under what forms of the law are they vindicated? Can he maintain any sort of action, or institute any sort of prosecution? or can he be held responsible in any form of action, or prosecution, as a civil person, a free man? If so, what is the case, and where is the precedent? None can be found. If it be said that the slave may bring a suit for his freedom, the reply is, that this is provided for by Statute, or proceeds upon the legal fiction that he is free and is therefore entitled to be relieved from bondage; and it is easy to see that the necessity for the statute or the resort to a legal fiction, demonstrates, in a more striking manner, the utter legal incapacity and impersonality of the slave. So absolute is this, that even in a suit between the executor and the distributees of the estate, the object of which is to ascertain whether or not he is emancipated by the will of his master, it is held error to make him a party. In a legal sense, he is as much *Homo sed non persona*, as ever was the slave of ancient Rome—although greater security to life and limb is afforded him by the more humane genius of our institutions and the pure spirit of an enlightened christianity. Very clearly, then, whatever privileges of personal enjoyment, or whatever actual protection, or whatever liability to punishment, humanity, or public opinion, or public policy and legislation, or a wise and kind domestic discipline may deem compatible with, or necessary to, the proper subordination of the slave, and may concede to, or provide for him, *yet when you come to*

speaking of his legal or civil rights and capacities, you speak of that which has no existence.

So completely is his condition an abnegation of all civil rights or capacity whatever, that even his own master cannot confer upon him, by deed or will, or in any other manner, any right, or privilege, gift or bequest, *short of absolute freedom*, and emancipation is defined to be, not in strict legal sense, a gift or bequest of freedom, but a mere *renunciation of property*, on the taking effect of which the slave is born into civil life. *Rucker v. Gilbert*, 3 Leigh, 8; *Wynn v. Carrell*, 2 Grat. 227; *Smith v. Betty*, 11 Grat. 752; *Wood v. Humphreys*, 12 Grat. 333, 340; *Crawford v. Moses*, 10 Leigh, 277; *Williamson v. Coalter's ex'or*, 14 Grat. p. 398. Thus, whatever may be the case elsewhere—whatever legal privileges or capacities slaves in other countries, in ancient or modern times, may have had; among us of the Southern States, there is no intermediary legal condition between absolute freedom and absolute slavery, between the high civil *status* of the freeman and the civil nonentity of his *chattel*. In the eye of the law, so far as civil relations are concerned, the slave is *property*, and *property only*. He is a *chattel*—and the legal attributes of a *chattel* are his legal attributes. All the civil rights, or capacities, which, as other men, he would have, as a natural person in a state of freedom, are, by the law of his condition, absolutely transferred to his master. He is but the object of the civil rights of others, and law as to him is a matter between his rulers—with which he has nothing to do. If it be said that although a *chattel*, he cannot be divested of his characteristics as a natural person, a human being,—a human body inspired with intellect, feeling, volition—that is conceded—(it is that which makes him so valuable a chattel); and the natural character of the *chattel* must determine the manner and kind of treatment it receives from its owner or others. Thus a horse, or a dog, a slave, or a pet lamb, would not be treated as a bale of goods. And the rights of the owner, and the responsibilities of third persons to the owner in respect to them, would not be the same. So in *Boyce v. Anderson*, 2 Peters 158, the question was, whether a Steamboat Company were to be held to as high a degree of responsibility, that of common carriers, in transporting a slave, as in transporting a bale of goods, and Judge Marshall said, delivering the opinion of the Supreme Court, that they could not be, since a slave has volition and feelings which cannot be entirely disregarded, and he could not be treated and packed away as a bale of goods, and therefore could not be under the same absolute control; but undoubtedly the *legal* character of the chattel in both cases was the same, as was attested by the fact of the form of action in the case being the same as

that for the loss of a bale of goods. Other and varied illustrations might easily be given. And this fact, the fact that the natural characteristics of the *corpus* or *subject* of chattel property, are not the same, cannot in any wise affect the legal character of the chattel itself. There are numerous laws against cruelty to animals, for instance, and there are laws prescribing death or other punishment for certain animals in case of dangerous or troublesome insubordination, roving, or ferocity. But these laws rather show the supreme authority of the law-making power, than recognize any legal or civil rights in the brute creation—the animals protected, or punished. And so with the laws punishing offences committed upon, or committed by, slaves. *The slave is still but a chattel, in which no legal or civil personal right inheres.* The fact that he is protected by the law, or is punished by the law, is no concession to him of legal rights or responsibilities, any more than in the case of other chattels, the accidents of whose natural characteristics are animate existence, and some sort of intelligence, volition and feeling. The high and sacred moral obligations of the master—which are so generally and conscientiously fulfilled—to protect, by law, the life and limbs of the slave from wanton violence, or the safeguards adopted by the master for his own protection and that of society, do not invest the slave with any legal, or civil *right* whatever. In full and strict accordance with this view, is the latest judicial decision upon the subject—that of a tribunal, which, in point alike of ability and learning, stands as high as any in the country, and deservedly commands great respect—the Supreme Court of North Carolina. “A slave,” says *Pearson*, C. J., “a slave, *being property*, has not the capacity to make a contract, and is not entitled to the rights, or subjected to the liabilities incident thereto. He is amenable to the criminal law, and his person (to a certain extent), and his life, are protected. *This, however, is not a concession to him of civil rights, but is in vindication of public justice, and in prevention of public wrongs.*” The other Judges, *Battle*, and the venerable and distinguished *Ruffin*, concurred in the opinion, of which these are the opening sentences—embodying the fundamental principle of the judgment which follows—a judgment which is but a striking illustration of the utter civil non-entity of the slave. *Howard v. Howard*, 6 Jones’ Law Rep., p. 204. (December term, 1858.) So, as we have seen, in the late case of *Bayly v. Poindexter*, 14 Grat., p. 198., the Supreme Court of Appeals of Virginia, speak of a *slave* as a “person whose *status* or *condition*, in legal definition and intendment, *exists in the denial to him of the attributes of any social or civil capacity whatever.*” That case was twice elaborately argued, and was decided after

great consideration ; and whatever may be thought of the ruling of the Court in respect to the authority of the cases of *Pleasants v. Pleasants* and *Elder v. Elder*, upon the particular point presented for adjudication, to wit: the validity of an emancipation by will made dependent upon the election of the slave between freedom and slavery, yet no doubt has ever been intimated as to the truth and legal accuracy of the great fundamental principle on which confessedly was based the judgment of the court, namely, that a slave has no legal or civil rights or capacity whatever. That principle indeed was virtually conceded by the eminent counsel who argued the cause for the slaves, and was amply sustained by the long and uniform train of decisions of the supreme tribunals of the several States of the Union cited at the bar, and commented and relied upon by the Court. The decision in that case, has been emphatically affirmed in the case of *Williamson v. Coalter's ex'or*, 14 Grattan's Reports, p. 394, and reaffirmed in the still more recent case of *Fox v. Fox's ex'or*, not yet reported, and the *principle* upon which these cases are founded, is admitted to be sound law, even by the learned dissenting judges, (Moncure and Samuels), who so strenuously contended against its applicability to the special point then under adjudication.

Hence, it may truly be said, in the language of Daniel, J., in *Dred Scott v. Sanford*, 19 How. p. 477, that a "slave is one devoid of rights, civil or political;" and (pp. 475-5) "*It may be assumed as a postulate*, that to a slave, as such, there appertains and can appertain no relation, civil or political, with the State or Government. He is himself strictly *property* to be used in subserviency to the interests, the convenience, or the will, of his owner; and to suppose, with respect to the former, the existence of any privilege or discretion, or of any obligation to others incompatible with the magisterial rights just defined, would be by implication, if not directly, to deny the relation of master and slave, since none can possess and enjoy, as his own, that which another has a paramount right and power to withhold. Hence it follows, necessarily, that a slave, the *peculium* or property of his master, and possessing within himself no civil nor political rights or capacities, cannot be a *citizen*;" nor in any wise a *legal or civil person*. And *a fortiori*, he can have none of the rights, in a qualified, or unqualified degree, which appertain exclusively to a civil person. And that it never was in the contemplation of the framers of the Constitution of the United States, that the Federal Government should have, or assume, jurisdiction over the slaves in the several States as *legal or civil persons*, and subject them to the pains and penalties applicable exclusively to such persons, is abundantly shown by the

lucid and candid statement of the intelligent historian of that instrument—a Northern man, who cannot be suspected of stating too strongly the truth of the case against slaves. “The social and political condition of the slave, *so totally unlike that of the freeman*, presented a problem hitherto unknown in the voluntary construction of representative government. It was certainly true, that by the law of the community in which he was found, and by his normal condition, he could have no voice in legislation. It was equally true, that he was no party to the establishment of any State Constitution; *that nobody proposed to make him a party to the Constitution of the United States, to confer upon him any rights or privileges under it, or to give to the Union any power to affect or influence his status in a single particular.*” 2 vol. History of Constitution U. S., p. 155. By George Ticknor Curtis, p. 155.

From these views, and authorities, which might be illustrated and multiplied *ad libitum*, it would seem to be demonstrated beyond controversy, that slaves are recognized in the Constitution of the United States, and in the laws and by the adjudications of the several States, merely as natural persons, as *persons held as property*, whose legal *status* or condition is that of *property*, and *property only*, and not as being in any sense, or to any extent legal or civil persons, persons having legal or civil rights and capacities, and subject to corresponding obligations or responsibilities as legal or civil persons. And this is the great and fundamental distinction of which sight has been so completely lost in the argument for the United States in this case. It is a distinction so broad and generic, as to have become the foundation of the whole system of laws in all of the slave-holding States in respect to slaves. So absolute and wide-pervading is the ethnological, civil, social and political difference between the dominant and the subject races—the white *American sovereign* and the black *African slave*—that they are not, and cannot be, governed by the same system of penal laws. Both the character and the number of the offences, and the kind and the degree of the penalties attached to them, are and must of necessity, be, different. And one striking and all-important difference arises from the inherent legal characteristics, the difference in the legal *status*, of the two races. An American citizen, or freeman, may be punished, for instance, by a fine or imprisonment—the forfeiture of money, or a temporary forfeiture, or deprivation of liberty. But, *ex necessitate rei*, from the very nature and law of his condition, it is absolutely impossible to punish a *slave* in this manner—*because he has neither property nor liberty of which to be deprived.* And even if this were legally possible, yet in

respect to the deprivation of liberty and confinement to manual labor, the vast and varied difference between the social position, usual habits, and natural constitution of the white sovereign and the negro slave, would render the same punishment, for the same offences by each, utterly and obviously unequal, inadequate and unwise, if not futile or impracticable, and it is scarcely within the extremest range of legislative inconsistency, negligence, or improvidence, that so enormous an incongruity and error should be contemplated or committed, in a whole system of jurisprudence—and yet that is what has been done by Congress, if slaves are included within this act. Certainly no slaveholding state has a place in its Penitentiary for slaves, or a provision for their punishment for crimes by confinement to manual labor—that, indeed, with some occasional relaxation of restraint, is the normal and habitual life of the negro slave, and it could never be adopted as a penalty in prevention of the peculiar peccadilloes of theft for which he would seem to be endowed with an inborn genius and proclivity.

In ample confirmation, and illustration of these views, we find the legislation of every State in the Union in regard to its slaves, and the uniform adjudications of the State courts in regard to the construction of statutes, so far as slaves are concerned. Thus Mr. Cobb well lays down the law:

“The protection of the person of the slave depending so completely upon statute law it becomes a question of importance, what words in a statute would extend to this class of individuals? Generally, it would seem that an act of the Legislature would operate upon every person within the limits of the State, both natural and artificial; yet, where the provisions of the statute evidently refer to *natural persons*, the court will not apply them to *artificial*. Nor will statutes ever be so construed as to lead to absurd and ridiculous conclusions. Experience has proved what theory would have demonstrated, that masters and slaves cannot be governed by the same laws. So different in position, in rights, in duties, they cannot be the subjects of a common system of laws. Hence the conclusion, that statutory enactments never extend to, or include the slave, neither to protect nor to render him responsible, unless specifically named, or included by necessary implication.” 1 Cobb’s Law of Negro Slavery in the United States, p. 91. And so again on page 263, of the same volume, it is said: “We have already seen that statutory enactments never extend to, or include the slave, neither to protect nor to render him responsible, unless specifically named or included by necessary implication. The result is, that the ordinary penal code of a slaveholding State does not cover offences committed by slaves, and

the penalties thereby prescribed cannot be inflicted upon them. A moment's reflection would show the propriety of this principle. To deprive a freeman of his liberty, is one of the severest punishments the law can inflict; and one of the most ordinary, especially when the penitentiary system is adopted. But to the slave this is no punishment, because he has no liberty of which to be deprived. Every slave-holding State has, hence, found it necessary to adopt a slave code, defining the offences of which a slave may be guilty, and affixing the appropriate penalties therefor."

If, therefore, this act of Congress were a State Statute,—or if in a State Statute the same language, "any person," were used, and the same penalties attached to the offences specified, as are found in this act, and the Supreme tribunal of any slave-holding State were called upon to construe it in respect to slaves, it would at once be held that there was nothing in the act specially pointing to slaves; and that the penalties attached—the payment of pecuniary fines, or the deprivation of liberty—the forfeiture of money or the forfeiture of freedom, or both—conclusively showed that slaves were not in the eye of the legislature at the time of its passage, since the fulfilment of such penalties, by the slave, is obviously and absolutely inconsistent with the law of his condition. No reason has been assigned, and none can be shown, why the same construction should not be placed upon this act of Congress. On the contrary, it is easy to see that the act must receive the same interpretation as similar statutes of the several slave-holding States. For in respect to the legal or civil *status* of slaves, it is conceded that the Federal Government has no constitutional authority or jurisdiction, and it must therefore legislate in respect to slaves, if at all, in obedience to, or in conformity with, their recognized *status* in the several States, who have exclusive and supreme jurisdiction upon the subject. Accordingly from its very foundation to the present time, all the acts of the Federal Government touching slaves have recognized them as property and not as persons in any just legal sense, and in so doing, have fully recognized the broad and complete contrast between the social, civil, and political condition of the dominant and the slave race, upon which is founded the separate code of penal laws for slaves which obtains in all of the slave-holding States. See 7th art. preliminary treaty of peace with Great Britain, 8 Stat. at Larg., p. 57, and 5th art. definitive treaty, 8 Stat. at Larg., p. 83; 1st art. treaty of Ghent, 8 Stat. at Larg. 218; in all of which slaves are the subjects of negotiation, "as negroes or *other property*," or "slaves or *other private property*;" 6 Stat. at Larg. 600; Constitution U. S., Art. 1, Sects. 3 and 9, Art. 4, Sect. 2; the three

fugitive slave laws, 2 Stat. at Larg. 126, 3 Stat. at Larg. 548, 9 Stat. at Larg. 462, in all of which, as in Art. 4, Sect. 2 of the Constitution, slaves are described as "persons held to service or labor," expressions fully recognizing the right of property in them, by virtue of which their owners are entitled to demand the aid of the Federal Government in securing their return. And special attention is invited to the fact, so full of significance in this case, that in all the clauses of the Constitution and in all the acts of Congress in which slaves are spoken of as "persons" at all, they are so designated by words of particular description, and then only to indicate them as the property of their masters. In fact the whole structure of the Federal Government is based upon the recognition of slaves as property, while their existence as legal or civil persons is ignored, or, by a negative pregnant, denied and repudiated. The third clause of the second section of the first article of the Constitution commonly cited to show that they are entitled to representation as being included among "three-fifths of all other persons," shows only that the "several States," that is the political communities composing the several States, in other words their masters, are entitled to representation, and are subjected to taxation on their account as property. Hence, in the Convention which formed the Constitution, Roger Sherman said truly, with good reason, when this clause was under consideration, that "he did not regard the admission of the negroes into the ratio of representation as liable to such insuperable objections. *It was the freemen of the Southern States who were, in fact, to be represented according to the taxes paid by them. and the negroes were only included in the taxes.*" 3 Mad. Papers, p. 1265. The slaves do not pay taxes, nor do they have any voice in the Government. Their masters are taxed and are represented in the fixed ratio, on account of themselves and of *their property in slaves*. So the Circuit Court of the United States, for the Eastern District of Pennsylvania and New Jersey, say: "Look at this article and you will see that slaves are not only property as chattels, but political property, which confers the highest and most sacred political rights to the States, on the inviolability of which the very existence of this government depends: 1. The apportionment among the several States composing this Union, of their representatives in Congress; 2. The apportionment of direct taxes among the several States: 3. The number of electoral votes for President and Vice-President, to which they shall respectively be entitled." * * * "Thus you see that the foundations of the Government are laid and rest on the rights of property in slaves—the whole structure must fall by disturbing the corner stones." Johnson v. Tompkins, 1 Bald. Reports,

p. p. 596-597. Thus in all this legislation of the Federal Government, organic and ordinary, slaves are as fully treated as property as in the statutes of any of the slave-holding States, and their social, civil and political inequality and degradation as completely recognised and established. There is every reason, therefore, why, in the administration by the courts of the general acts of Congress, the same rules of construction should be observed, so far as slaves are concerned, which have been established by the Courts of Supreme judicature in the several States in respect to the general statutes of the States. And even in the absence of these facts, this should be true upon other considerations which have been often and amply recognized by the Supreme Court of the United States. For it is well known that although in matters of general Federal jurisdiction, the Courts of the United States, rightly adopt their own rules of construction, yet in subject-matters peculiarly of State and local concern and jurisdiction, if they do not always feel bound to adopt the rules of construction or the decisions of the State Courts, great and profound respect is ever paid to them. And particularly ought this to be the case in regard to laws affecting slave property, and offences committed by, or upon slaves,—subjects, eminently of State and local interest and occurrence, with which, ordinarily, the Federal Courts have so little to do.

Now, in reference to the subject-matter of the punishment of slaves by the Federal Government, it is to be observed, in this connection, and especially in view of the Constitutional question hereinafter to be noticed, that so far as has been shown by the counsel for the United States, in the argument of this cause, and so far as a careful examination of the acts of Congress with the view to ascertain the fact may be entitled to confidence, Congress has passed no act whatever, of a penal character, in which slaves are specifically included, either *eo nomine*, or by words of particular description, such as those in which they are specially designated in the Constitution of the U. States and the various acts of Congress which have been above cited.

In the vast majority of cases, in fact, the punishments are of such a character as necessarily to exclude slaves. The penal code of Congress is unique; and with the occasional exception of capital punishment for offences of great enormity, fine and imprisonment, singly or together, constitute the sole penalties imposed. Evidently this penal code was never designed to extend to slaves; for the great inadequacy and inequality of the punishments inflicted, as applied alike to citizens and to slaves, as well as the legal incongruity and impossibility of applying to slaves the penalties (applicable only to civil persons) denounced against at least nine-tenths of the offences, conclusively show

that white men and freemen were alone in legislative contemplation. Even supposing that the Federal Government had criminal jurisdiction over slaves, nothing is easier or more natural than to account for this omission of Congress to legislate upon the subject. The great mass of Southern slaves are constantly engaged in agricultural and other rural labor, under the immediate eye and control of their masters or superintendents, and far removed from contact with any of the agents or operations of the Federal Government. And the whole subject of the management, discipline and punishment of slaves is so peculiarly a matter of State jurisdiction and municipal police, and so wise, effectual and all-pervading have been the State legislation and the action of the State tribunals, and the still more general and successful administration of the patriarchal laws of the household and the plantation, that a more orderly, law-abiding and quiet population never existed, than the slave population of the South, and, what with the State tribunals, local police, and family government, Congress has had no occasion to pass a separate code of laws for slaves, or to adapt the penalties of its acts to suit their legal and social condition. Certainly, under these circumstances, it is more reasonable to suppose that the case of slaves is *casus omissus*, than to suppose that in relation to all offences alike, Congress, composed until of late years of a majority of slave-holders, or representing a majority of slave-holding constituencies, should have designed to place the white citizen and the black slave upon an equal footing, and that, contrary to the spirit of all the other action of the Federal Government in regard to slaves, and in utter contempt of the established legal *status* of slaves in the several States, which the Federal Government was itself bound to respect and protect, slaves should have been treated as legal or civil persons, and subjected to penalties applicable only to such, and that, accordingly, penalties should have been provided for him, in the great mass and majority of cases, from which, unless the Constitutions and laws of the several States in which he exists, were to be crushed under foot, the slave, by the law of his condition, is necessarily and absolutely exempt.

Yet such must be the case, if this act, which forms no exception to the general mass of penal acts, be construed to include slaves. And hence, in view of the whole penal legislation of Congress, (in which the phraseology is the same as that used in this act), it becomes a question of grave interest and magnitude to the slave-holding States, what construction shall be placed upon its terms, so far as slaves are concerned. If for fines which they cannot possibly pay, and for all the multitude of Federal offences within the range of Penitentiary punishment,

the slaves of Virginia, of Alabama, of Louisiana, or of Texas, are to be seized from their work by the Federal arm and whiffed away to Washington City, and there immured in prison for life, or until their fines are paid, or for any time from three months to twenty-one years, and their masters are to receive no compensation for their value or the loss of their services, and are to be put to the peril of losing them forever after their imprisonment is over, the sooner this startling new code is promulgated, the better.

It is impossible not to see that if slaves be included in this act, it can only be in violation of all the established rules of statutory construction adopted in respect to them by the several States, and which, as has been shown, the Federal Courts are as much bound to recognize as the Courts of the several States; in violation and disregard of the established legal *status* of slaves, and against the long and uniform course of dealing as to slave-property which has characterized the Federal Government in all its departments. There must, hence, be some very strong and paramount reason for including them, if all these considerations are to be overridden and trodden down. It may be said—it can only be said—that though not included by name, nor by words of special description, as is usual in the Federal State papers, and though it would seem that they were perforce excluded by the incompatibility of the penalties imposed with the fundamental law of their being, yet that they are included by *necessary implication*. But how can this be? So far as the mischiefs contemplated by the act are concerned, certainly no reason appears why they should not have been included. It is perfectly true that there is nothing in the object and policy of this act to exclude slaves from its provisions, or from punishment for the offences therein enumerated, since obviously the mail may be robbed by slaves as well as by persons who are free, and it may be further said that unless slaves are punishable under the act, they may be made the instruments of depredations upon the mail, guided or wielded by the hands of others, who may escape with impunity. All this, however, only shows the necessity of a law punishing slaves in an adequate and appropriate manner for such offences; and it may be a very strong and unanswerable argument to prove that they should have been included in some provision of the act, with effective and suitable penalties thereto attached. And the same remark applies with equal truth to a thousand other offences under other acts of Congress, the penalties for which being merely pecuniary fines, for instance, clearly cannot include slaves. This kind of reasoning certainly shows what ought to have been done. It does not, and cannot prove, what has been done. As the exigencies of

society are developed, the discovery of the necessity for a law can never be urged as proof of its existence. If so, felons would never escape—or innocent men either. So to construe an act, is to make *ex post facto laws*. The act must be construed by its obvious intent and legal application, and not be stretched to cover all possible, or supposable cases, within its mischief, which might, or ought to have been provided for, *but were not*. Looking to this act, it is seen that, so far from special reference being made to slaves, *eo nomine*, or by particular description, as in all State papers of the Federal Government, in which they are confessedly included, here the penalties provided are such that slaves cannot legally suffer, or possibly be made to fulfil,—from which the inference naturally and irresistibly arises that they were not in the contemplation of Congress in framing and passing the act. If the penalty imposed in all cases were merely a pecuniary fine, this certainly would be demonstrably clear,—for no one could have the hardihood to contend that it is in the power of a slave to pay a fine. It is not perceived that the logic is altered by adding imprisonment to the fine in some cases, or by providing imprisonment alone in others, as in the case at bar. The whole act must be scanned and construed together. It is one law. Its very title is an “Act to reduce into one the several acts establishing and regulating the Post-office Department.” And in scanning the whole act, we see that, of some several hundred different offences for which indictments could be framed, the penalties for about one half are pecuniary fines alone, varying from \$10, to \$500,—the penalty for scarcely one-fourth is imprisonment alone, varying from three months to twenty-one years, and, with the exception of death in a single instance, the penalties for the rest are fines and imprisonment, in the alternative or together, the fines varying from \$50 to \$2,000, and the imprisonment from six months to twenty-one years.

Can it be imagined that slaves were in contemplation of Congress when this act was passed? An act, of which all the offences were equally within the object, mischief and policy to be provided for, yet of which at the least, more than two-thirds of the penalties, (being mere pecuniary fines, directly or in the alternative or cumulative), are such that slaves confessedly cannot suffer? An act of which, in fact, except in the solitary exception of the punishment by death for a single offence, all the penalties are such that the slave, by the very law of his condition, cannot be compelled to fulfil, and which, therefore, for him, are no penalties at all? Would it be doing justice to the intelligence of Congress, to indulge so extravagant an hypothesis? No reason can be assigned why the slave should have been in contemplation of Congress in one clause of the act rather than

in another. Why, if a slave steal a letter containing no article of value, should he be held not included within the act, because the penalty is a pecuniary fine and imprisonment, while if the letter contain an article of value, he is to be held included within the act, the penalty in such case being imprisonment alone? Is he more or less a "person" in the one case than the other? If included in one clause, why not in all? If not in all, why in any? Is the circumstance of the presence of an article of pecuniary value in the letter, any special reason why punishment should be imposed upon slaves, while in other cases they are exempt? Does the most important and really valuable correspondence, correspondence communicating commercial, social, political, or military intelligence, of the largest consequence and magnitude, to the parties or to the Government, usually contain any article of pecuniary value at all? Is not the great burden of the mail composed of letters or packages containing no money, mercantile security, or other evidence of debt? Why, then, should slaves be within the object and policy of the law in respect to the least important part of the mails, and yet be excluded from offences against all the rest, which constitute the great bulk and business of the postal system? If it be said that slaves are equally within the mischief and policy of all the offences of the act, but that evidently as to those offences of which the penalties are pecuniary fines, or pecuniary fines and imprisonment, they were not in contemplation of Congress, because they cannot pay a fine, and to imprison them until the fine be paid, would be but to inflict unjust punishment upon their innocent masters; it may be said with equal force and truth, that neither in respect to the offences of which the penalty is imprisonment alone, could slaves have been in legislative contemplation, since deprivation of liberty, in a legal sense, is, by the law of his condition, as much an impossible thing to the slave as the payment of a fine by him, while in either case the loss of his services, during imprisonment, falls identically as the same unjust punishment upon his innocent owner. If, indeed, a slave cannot be imprisoned for not paying a fine, how can he be imprisoned for any other delinquency? And is not an imprisonment of the slave for an offence against the law, just as much an unjust punishment of his unoffending owner, as if the slave be imprisoned for not paying a fine, which is a penalty imposed by law? What is the difference in principle or in fact? If it be said that the slave has the physical capacity to suffer punishment by imprisonment, so also has he physical capacity to suffer punishment by paying a fine, though he has no legal capacity to do either: and you may as well compel the master to pay the money of the fine, as to compel him to part with the time and labor of his

slave, worth more to him, in many cases, than forty-fold the fine ! Surely it behooves those who contend for a construction of the act of Congress which is so much at variance with the ordinary and established rules of construction, and with all the other action of the Federal Government concerning slaves, to reconcile these numerous contradictions and incongruities. And yet no explanation has been offered. None can be given.

It is therefore respectfully, but earnestly submitted, that upon no principle of rational, or consistent interpretation, can the slaves be included within this act.

If the foregoing views are not wholly erroneous, it has been conclusively shown—

1. That, in ordinary legal contemplation and parlance, slaves are not regarded as persons, but as property ; and that, although as chattels, they must still be, and remain natural persons, yet that they are not, and from the law of their condition, necessarily cannot be, legal or civil persons : hence that, *prima facie*, in general statutes of the States, or general acts of Congress, they are not included—such statutes or acts ordinarily having reference only to legal or civil persons ; and that in order to include slaves, they must be mentioned *eo nomine*, or by words of special description, or by necessary implication.

2. That in the penal code of the Federal Government, slaves are no where mentioned, *eo nomine*, or by words of special description ; and that, although from the object and policy of many of the penal acts, it would seem that slaves ought to have been included, and, in the absence of any thing to the contrary, might possibly be construed to be included by necessary implication, yet that, in respect to those very acts, by the character of the penalties imposed, in the great mass and majority of cases, slaves are, by the law of their condition, necessarily and absolutely exempt.

3. That of this character is the particular act, and especially the particular provision of the act, under which this prosecution is instituted.

To all of which, it might be added, if need be, that neither in the summoning of slave witnesses, the most common and important witnesses, for, or against, their fellow-slaves ; nor, (pursuant to that humane clause of the Federal Constitution which stipulates that “ excessive bail shall not be required,”) in allowing, or providing for the taking of bail in the case of slaves, who cannot enter into bail-bonds for themselves, and who are therefore, under the general law, now incapable of being bailed at all, and the Constitution thus made a dead letter, in that respect, so far as they are concerned ; nor, in adapting the mode and incidents of trial to suit the civil and social *status* and char-

acter of the slave ; nor, in providing suitable and sufficient penalties for slaves, and avoiding the inequality, fatuity and injustice of putting the white citizens and freemen of the whole country together with the negro slaves of the South, in the same offences, and the same punishments—side by side in paying fines or at hard labor in prison, or otherwise ; nor in providing just compensation to their owners for the loss of the services, or of the total value of slaves, when they are thus taken for the public use ; nor in providing for their safe and speedy return or delivery to their owners, after the period of punishment has expired ; in none of these important respects, most, or all of which are, deemed necessary or proper to be provided for, in the penal codes of all the slave-holding States—and in no view whatever, do slaves, in any instance, and certainly not in this act, seem to have been in the mind and contemplation of Congress. If, therefore, Congress has passed a penal code for slaves at all, it has designedly enforced it by penalties which necessarily exclude them from its provisions, and it has provided no machinery for its administration by the Courts ! Such is the dilemma to which the Government is driven in this case.

II. In respect to the Constitutionality of the act if it be held to include slaves, no answer to the points raised in the opening argument for the defendant, has been furnished or attempted by the counsel for the Government. They appear to be unanswerable, however they may be overlooked or avoided. It may be pardoned to state them more fully.

1. Congress has no Constitutional authority to treat a slave as a free man, or civil person ; it cannot endow him with the right to be tried as such ; it cannot subject him to the obligations or penalties, which can be fulfilled or discharged only by freemen, or civil persons—therefore it cannot give him the right of trial by a jury of his peers—and it can try him by jury in no other way. Nor can it compel him to pay a fine or part with liberty—things impossible to be done by a person in his condition. To assume this power, is to assume authority to change the civil *status*, the legal character and relations of slaves, a matter peculiarly and exclusively of State sovereignty and jurisdiction.

2. The Federal Government has no Constitutional authority to punish slaves *at all*. “The Judicial power of the Federal Government,” says St. George Tucker, “extends to all cases in law and equity, arising under the Constitution. Now, the powers granted to the Federal Government, or prohibited to the States, *being enumerated*, the cases arising under the Constitution can only be such, as arise out of some *enumerated power delegated to the Federal Government, or prohibited to those of the several States*. These general words include what is com-

prehended in the next clause, viz. cases arising under the laws of the United States." 1 Tucker's Com. Black. App. 418. See also 2 Story on Constitution U. S., p. 420-1. And the Supreme Court say in *Dred Scott v. Sanford*: "The power of Congress over the person or property of the citizen can never be a mere discretionary power under our Constitution and form of Government. The powers of the Government and the rights and privileges of the citizen are regulated and plainly defined by the Constitution itself." * * * "And the *Federal Government can exercise no power over his person or property, beyond what that instrument confers, nor lawfully deny any right which has been reserved.*" 19 Howard U. S. R., p. 440-450. Now in respect to slaves, the court say, as we have seen, "The only two provisions which point to them and include them, treat them as property, and make it the duty of the Government to protect it; no other power, in relation to this race, is to be found in the Constitution; and as it is a Government of special, delegated powers, no authority beyond these two provisions can be Constitutionally exercised. The Government of the United States had no right to interfere for any purpose but that of protecting the rights of the owner, leaving it altogether with the several States to deal with this race, whether emancipated or not, as each State may think justice, humanity, and the interests and safety of society require. *The States evidently intended to reserve this power exclusively to themselves.*" p.p. 425, 426. If then it be true, as it is universally conceded to be true, that the Federal Government is a Government of special, delegated powers; and if it be true, as we are bound to accept it to be true, under the adjudication of the Supreme Court, that the only Constitutional power delegated to the Federal Government in respect to slaves, is the power to protect them as the property of their owners; it would seem to follow not only as a natural, but as a necessary and irresistible consequence, that the Federal Government has no criminal jurisdiction over them whatever. The case is different in regard to the States. The power and authority of the States over their slaves, is sovereign, supreme, unlimited. The only power delegated by the several States to the Federal Government in respect to slaves was the "power," in the language of Chief Justice Taney, delivering the opinion of the Supreme Court, "the power to protect them as property;" all other powers, therefore, in reference to them, were reserved to the several States respectively. To punish slaves therefore, and to keep them under due discipline, is thus a matter exclusively of State jurisdiction.

The slave may be duly punished by the State laws for crimes of any character—he is under the absolute dominion of the

State Governments—but he is known to the Federal Government only as *property*, and to be *protected as such*,—the property of his masters, the depositaries of State sovereignty and power. And while the Federal Government, so far as is known, has never presumed to pass any penal law specifically embracing slaves, and has never before this prosecution asserted jurisdiction over them in criminal cases, each of the several slave-holding States, on the other hand, has enacted virtually a separate code of laws for the punishment and protection of slaves, in which, alike in the character and number of offences, and the kind and degree of punishment, due regard is had to the social, civil, and political differences between the dominant and the subject race, and in which, while proper subordination and goodly courses are carefully preserved, substantial safeguards are provided for the personal security of the slave. Nor does any inconvenience arise to the Federal Government from this want of criminal jurisdiction over slaves, since the State laws thus provide full and fit punishment for all offences of which a slave may be guilty. The case at bar is a case in which, as is well known, slaves have often been prosecuted and punished under the laws of the State of Virginia, in the Hustings Court of this City of Richmond. And the fact that this case, so far as is known, is the first case in which, since the foundation of the Government (a period of seventy odd years) this Court has ever been asked to take jurisdiction over a slave, would seem very strongly to indicate the absence of any necessity for the assumption of jurisdiction, in such cases, by the Federal Courts

Now it may be said, in answer to these views, that the Constitution expressly gives Congress the power “to establish Post-offices and post roads,” and therefore, by implication, power to protect them after they are established, and the splendid judgment of Chief Justice Marshall, in *M'Culloch v. The State of Maryland*, 4 Wheat. 417, may be cited, in which this doctrine was incidentally discussed and established.

But the answer to that view is furnished by the Supreme Court in *Dred Scott v. Sanford*, 19. How. p. 425. And however true and irrefragable may be the logic of Judge Marshall in *M'Culloch v. The State of Maryland*, yet it may be said that it applies only to such persons as those over whom the Federal Government has general jurisdiction, and not to slaves, in respect to whom, the same Supreme Court have solemnly declared that “The only two provisions in the Constitution which point to them and include them, treat them as property, and make it the duty of the Government to protect it. No other power, in relation to this race, is to be found in the Constitution; and as

this is a Government of special, delegated powers, no authority beyond these two provisions can be constitutionally exercised."

But whatever may be thought of this denial to the Federal Government of general jurisdiction over slaves, it must be conceded by all, that it can exercise jurisdiction, if at all, only in accordance with the law of their condition, their legal *status* in the several States, a matter which the Federal Government cannot alter or affect. And, therefore, in any light, the penalties of this act, if applied to slaves, are unconstitutional.

3. This act is unconstitutional, if it include slaves, because it makes no compensation to the owner for property taken for the public use. It is true that the origin of the 5th amendment to the Constitution which provides that "private property shall not be taken for public use, without just compensation," was the apparent necessity of protecting private property from unjust seizure in times of war; but that circumstance can scarcely be judicially held to confine the application of the great Constitutional right, thus secured, to the extraordinary cases of public invasion or hostilities. Indeed nothing is more common than for the Federal Government in time of profound peace to pay for private property taken for public use, as in the case of sites for Custom Houses, of which an illustration is furnished in the site of the elegant structure in which this Court is held and the Post-office establishment located. Nor will it do to say that these are all cases of fair purchase on the part of the Government—that fact is but a recognition of the sacred rights of private property; and if the Government cannot, without just compensation, take the property of the citizen for one purpose, it is difficult to see how it can take it for any other purpose whatever, or if for any one purpose, then not for all. Whenever taken at all, it is taken for some real or supposed public good, and the public, under the Constitution, must pay for it. If the Government cannot take a site on which to build a Post-office, without paying for it, how can it seize property in the shape of slaves, whether for punishment or otherwise, in order to keep up the Post-office, or postal system, after it is established? Does it matter to the owner whether the slave is seized as "property," or as a "person," since whether taken as the one or the other, *the legal character of the slave as property remains the same, and the loss and injury to the owner identical?* And although it should be admitted to the fullest extent, for which it is contended, that slaves are to be viewed in the two-fold character of property and persons, yet is it not perfectly apparent, even upon this hypothesis, that whether dealt with, as property or as persons, *this two-fold character cannot be disre-*

garded, so that if the slave be punished as a person, he must still be paid for as property!

It is quite in vain to say that it is an incident of property in slaves, that it may be forfeited to the Federal Government, if the slave commit an offence against its laws. In the eye of the law, under the Constitution of the United States, and the Constitutions and laws of the several States—slave property is precisely like any other property, and to be protected as such, and has identically the same legal incidents; and if the rights of the owner of a slave in and to his labor and services, can be forfeited to the Federal Government by reason of any action of the slave, then the anomalous absurdity would follow that the *title* of the owner is placed at the mercy of the property owned! It is the legal incident of no kind of property whatever, to have the capacity to *forfeit or affect the TITLE* of its owner by any action of its own, however true it may be that the *value* of a slave or of other animate property, may be injured by negligent or vicious conduct on its own part. And this is the true, the clear and broad distinction to be taken. If it be conceded that the Federal Government has the Constitutional right, in self-defence, or in protection of its property or citizens, to punish slaves at all, yet, as we have seen, it must do so by penalties compatible with their legal condition, and in subordination to the vested rights of the owner. Property in slaves existed *before, and exists independently of*, the Constitution, which did not create, but recognizes and protects it. *Johnson v. Tompkins*, 1 Bald. Rep. 596. *Dred Scott v. Sanford*, 19, How. 419. If the Federal Government punish slaves as persons, it must remember that they are *property also*, and as such must be protected and paid for, when seized and used for the public good. The several States undoubtedly have the right to say that the owner shall lose his title to the services of his slave, if the slave commit an offence against the law, and some of the States have virtually done this by prescribing the penalties of death or transportation for slaves, in certain cases, without providing compensation to the owner. This has been done as a part of their municipal polity and police in respect to slaves, upon the idea that by tying the self-interest of the master the more closely to the common-weal, greater diligence would be encouraged on his part, alike by coercion and kind treatment to keep his slaves in due subordination and goodly courses. Therefore, in some States the master gets only half or two-thirds of the value of the slave who is hung for crime, in others, nothing: of which the frequent consequence is, that no sooner is a capital crime committed by the slave, than he is run off to another State and sold, and public justice thwarted—a condition of things avoided in Virginia,

Maryland and other States, by paying the full value of the slave. Now the several States may do this, or they may take slave-property or property of any other kind for public use, without just compensation—they may even annihilate all property in slaves by general emancipation—because they have absolute sovereignty and jurisdiction over the subject of slaves and slave-property—and there is nothing in the Constitution of the United States, which forbids it; for the limitation in question applies not to the States, but to the Federal Government. Thus in *Barron v. The Mayor and City Council of Baltimore*, 7 Peters, p. 243, Mr., (now Chief Justice) Taney, then at the bar, on rising to speak to that point, was stopped by the Court, and Judge Marshall, delivering its opinion, said “the question presented is, we think, of great importance, but not of much difficulty,” and decided that, “The provision in the 5th amendment of the Constitution, declaring private property shall not be taken for public use, without just compensation, *is only a limitation of the power of the United States*; it is not applicable to the legislation of the several States.” While, therefore, the several States are at full liberty, in the exercise of sovereign power, to take private property for public use, without compensation, no such power is vested in the Federal Government. The only power, say the Supreme Court,—certainly the paramount duty—of the Federal Government in respect to slaves, is to protect the rights of property of their masters in and to them. To seize and carry them away, and keep them out of the service of the owner and beyond the jurisdiction of his sovereign State, for the emolument or advantage of the Federal Government, without compensation to the owner, would certainly be a strange way of showing that protection! Whether the slave be seized and carried away to be employed directly on works of public utility for the Federal Government, or to be punished by being employed, in “imprisonment and confinement to hard labor” for the profit, advantage or benefit of the Federal Government, matters but little to the owner whose property is thus appropriated without compensation, and it amounts to but mockery to tell him that his property is used or destroyed by the Government in self-defence! Private property is always taken by the Government in self-defence, or for self-advantage. The manner in which, or the *purpose* for which, or the *cause* or necessity for which, the Government proposes to use or appropriate, slave property, or any other property, without just compensation, cannot in any wise alter, or affect, the obligation to pay for it. Whether, for instance, in time of war, a slave, in a sudden emergency, be pressed into public service, (as at the defence of New Orleans), either as a teamster, or as an artillery man, or as

a soldier of the line, whether he be used in the capacity of "property" or a "person," to *work*, or *fight*, cannot vary the Constitutional obligation and duty of the Government to pay the owner the full value of his services, during the time the slave is thus employed for the public good, or to pay for his whole value in case of his permanent detention or of his being killed. The public must be the judge of its own necessities, and of the manner and time of taking private property for public use, as well as of the uses and purposes for which it is to be employed; but this fact cannot abrogate its responsibility to pay for the property it thus appropriates to its real or supposed necessities. Least of all, can it be urged that in punishing slaves by fine and imprisonment, or by imprisonment until the fine be paid, where fine alone is imposed, the Federal Government would not take them as property, but as persons responsible to penal laws, and that the loss to the owner, of his property, follows incidentally as a natural and unavoidable consequence of property in slaves. For this assumes, first, that slaves can be punished by penalties incompatible with the fundamental law of their condition. It assumes, secondly, that the loss or damage inflicted upon the owner, is incidental, which is not the fact. It assumes, thirdly, that if such loss be incidental, that circumstance would affect the right and principle of compensation. Certainly the Federal Government can inflict no penalty upon the slave which is inconsistent with, or repugnant to, the law of his condition; for it must be conceded that the Federal Courts are bound to respect and to protect that law, the *status* of the slave being a matter exclusively of State jurisdiction. It must be equally apparent that the loss resulting to the owner from the service and detention, or destruction of his property, is direct and positive, and susceptible of clear and easy calculation—such as is made every day in actions of detinue or trover for slaves. Nor, if the fact were otherwise, would the conclusion be different. For, if the loss to the owner, of the labor and services of the slave, be the certain and inevitable consequence of its seizure and detention, or annihilation, it matters nothing in substance, whether that loss be direct or incidental—the *fact* of the loss to the owner by the appropriation of his private property by the public, for its own emolument or use, or in furtherance of its policy, is that which constitutes the *gravamen* and justice of the charge, and which must fix upon the public the responsibility of paying for it. And so are all the analogies of the law. Whether, for instance, a defendant is liable in trespass *vi et armis*, for a direct injury, or in case, for consequential damages, often presents a nice question in special pleading; but the *fact* of his liability, in law and in justice, is equally as certain and well settled, in

the one case as in the other, and the recovery as great, according to the evidence of the actual loss sustained. The truth is, that the whole idea of the legal responsibility of the slave to the Federal Government for offences against its laws, and therefore of the liability of the owner incidentally to the loss of his property in consequence of the punishment of the slave by imprisonment or death, rests, it is respectfully submitted, upon a fallacy, which is the result of that radical misconception of the legal *status* and relations of slaves which has been pointed out and established in another part of this argument. The slave is a *chattel* in the eye of the law, and nothing more. He has no civil or political rights, and therefore no corresponding *responsibilities* or relations to the State. He is *punishable* by statute, when included by name, description or necessary implication, as a natural person; but always and only in a manner compatible with the law of his condition, as a chattel. The several States, having sovereign and absolute jurisdiction over the subject, may or may not, according to their views of municipal or domestic policy, compensate the owner for the value of the slave, in case of his transportation or capital punishment. But that circumstance in no wise affects the fact, which is the grand *substratum* of the only consistent and rational system of jurisprudence upon the subject, that slaves, as such, being mere property, have no civil or political rights, obligations, or relations, and are therefore incapable of being held to the same kind or degree, or to any kind or degree of responsibility, as persons having civil and political rights, obligations and relations. Their punishment is always, and necessarily, a matter of positive statute, and *ex virtute magistri*—based, not upon any recognized civil, social or political obligation of the slave to obey the law, but upon the sovereign and supreme mandate of his master, embodied in the law, the observance of which is enforced by penalties inflicted for its violation. The slave is punishable, but upon a different principle, and in a different manner, and often in a different degree, from that in which a civil and political person is punished. He is punished as a matter of chastisement and discipline, according, indeed, to principles of natural justice and moral obligation; but certainly not upon any hypothesis of violated civil, or political obligations, the sanctity of which is to be enforced or preserved by the surrender, or forfeiture by him, in whole, or in part, of civil or political rights and franchises, such, for instance, as the deprivation of property, or of liberty, or of the capacity to hold, or take offices of public emolument, honor and trust. Obviously this vast, radical and all-pervading difference results necessarily from the established and conceded absence, on the part of the slave, of all civil, or political rights, and re-

lations to the State—that organized sovereignty whose will is his law, of which he forms no constituent element, in which he has no voice or influence, and to which he stands as a chattel, the subject of property and the object of the civil rights of others, the component parts of that supreme and sovereign power over and above him. This was the legal *status* of the slave at the time of the adoption of the Federal Constitution, and it so continues. That instrument recognizes and protects slavery as it then existed and still exists in the several slaveholding States, and, therefore, in the penal laws of the Federal Government in regard to slaves, it must recognize and respect that great fundamental fact. This, therefore, being true—since in a legal sense—in the sense of *obligation* correlative to *right*—in the sense of the maxim, *Jus et obligatio sunt correlata*—the slave is not bound to obey the laws, either State or Federal, *he cannot be punished upon that hypothesis*. He cannot be punished by the forfeiture or deprivation of any civil or political right, possession, franchise, or immunity—he has none to forfeit or lose. Still less can he, by any act of his own, directly or incidentally, forfeit, transfer or affect the legal rights of others, the right of property, for instance, in his labor and services, the right of property in and to himself and his posterity, which, by the law of his condition, is vested in his owner. While, therefore, he is certainly punishable for crime, yet so far as the Federal Government is concerned, beyond all question he cannot be punished as a civil or political person, a person having civil, or political rights, obligations or responsibilities, but he must be punished, if at all, in strict accordance with the law of his condition, in profound respect to his established legal *status*, and only and always in perfect subordination to the vested rights of his master in and to him as *property*, guaranteed and secured as they are, in the most positive and emphatic manner, by the Constitutions and laws of the several sovereign States in which he exists, and sanctioned and shielded by the Constitution and laws of the United States. In so far, then, as this act of Congress attempts to punish slaves by pecuniary fines and imprisonment, it is clearly unconstitutional; and in so far as it attempts to do this, without providing just compensation to the owner for the detention and loss of his property thus taken by the public for its own use and purposes, it is still more clearly and manifestly unconstitutional and void.

The foregoing arguments were written out by the counsel at our request. That of Mr. Howard, in reply, he informs us, is fuller, or more in detail, than was the oral presentation of his views.—[Ed.]

TANEY, CH. J., delivered the opinion of the Court.

The prisoner (Amy) in this case was indicted for stealing a letter from the post-office, containing articles of value, particularly described in the indictment. It appeared in evidence on the trial that she was at the time the offence was committed, and at the time of trial a slave, and her counsel therefore prayed the direction of the court to the jury that the prisoner was not embraced in the description of persons to which the law in question applied, and upon whom it intends to inflict punishment.

The motion was overruled by the court and the prisoner under its direction was found guilty by the jury, as charged in the indictment.

And a motion is now made to set aside the verdict and grant a new trial, upon the ground that the instruction asked for ought to have been given, and that the court erred in refusing it.

The act of March 3d, 1825, section 22, under which the prisoner is indicted, provides that if any person shall steal, or take a letter from the mail, or any post-office, the offender shall, upon conviction thereof, be imprisoned not less than two, nor more than ten years.

It has been argued in support of the motion that a slave, in the eye of the law, is regarded as property. And as the act of Congress speaks only of *persons*, without any reference to the property of the master, and makes no provision to compensate him for its loss, it was not intended and does not operate upon slaves.

It is true that a slave is the property of the master, and his right of property is recognized and secured by the Constitution and laws of the United States. And it is equally true that he is not a citizen, and would not be embraced in a law operating only upon that class of persons. Yet, he is a person, and is always spoken of and described as such in the State papers and public acts of the United States.

Thus, the two clauses in the Constitution which point particularly to property in slaves and sanction its acquisition and provide for its protection, both speak of them as persons without any other or further word of description.

The clause which authorized their importation declared "that the migration or importation of *such persons* as any of the States now existing shall think proper to admit, shall not be prohibited by Congress prior to the year one thousand eight hundred and eight."

And the clause intended to protect the right of property in the master provides "that *no person* held to service or labor in one State, under the laws thereof, escaping into another, shall,

in consequence of any law or regulation therein, be discharged from such service or labor; but shall be delivered upon claim of the party to whom such labor or service may be due."

And the 3rd clause of the 2d section of the first article, which apportions the representation in Congress among the several States, describes them by the same word and provides "that representation and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of *all other persons*," and under this description slaves have always been enumerated in the census; and the slaveholding States represented in Congress according to their numbers in the proportion specified, and no one has ever questioned the right of the slave holding States to this representation, or doubted the meaning of the words *all other persons*.

It is evident, therefore, that the word person is used in the Constitution to describe slaves as well as freemen. And a Court of Justice would not be justified in refusing to give the same word the same construction, when it is used in an act of Congress, unless there was something in the object and policy of the law, or in the provisions with which the word was associated, which manifestly indicated that it was used in a different and narrower sense, and intended to be confined to persons who are free.

There is certainly nothing in the object and policy of the law in question from which it can be inferred that slaves were not intended to be punished for the offences therein enumerated.

The offences were as likely to be committed by slaves as by freemen, and the mischief is equally great whether committed by the one or the other. And if a slave is not within the law, it would be in the power of the evil disposed to train and tutor him for these depredations on the mails and post offices, and as the slaves could not be a witness, the culprit, who was the real instigator of the crime, would not be brought to punishment. And if the slave himself is not within the law, the crime might be committed daily and with perfect impunity, and all of the safeguards which Congress intended to provide for the protection of its mails and post-offices would be of no value. Such a construction would defeat the whole evident object and policy of the law, and would rather tempt to the commission of these offences by the certainty of impunity, than to prevent them by the fear of punishment.

In expounding this law, we must not lose sight of the two-fold character which belongs to the slave. He is a *person* and also *property*. As property, the rights of the owner are entitled to

the protection of the law. As a person, he is bound to obey the law, and may, like any other person, be punished if he offends against it; and he may be embraced in the provisions of the law, either by the description of property or as a person, according to the subject-matter upon which Congress or a State is legislating.

It is true, that some of the offences created by this act of Congress, subject the party to both fine and imprisonment. And it is evident that the incapacity and disabilities of a slave were not in the mind and contemplation of Congress when it inflicted a pecuniary punishment. For he can have no property, and is also incapable of making a contract, and consequently could not borrow the amount of the fine; and a small fine, which would be but a slight punishment to another, would, in effect, in his case, be imprisonment for life, if the Court adopted the usual course of committing the party until the fine was paid. And we think it must be admitted that in imposing these pecuniary penalties Congress could not have intended to embrace persons who were slaves, and we greatly doubt whether a Court of Justice could lawfully imprison a party for not doing an act which by the law of his condition it was impossible for him to perform. And to imprison him to compel the master to pay the fine, would be equally objectionable, as that would be punishing an innocent man for the crime of another.

The case before us, however, does not involve this question; and we must not be understood as expressing a decided opinion upon it. The offence of which the prisoner has been found guilty, is punished by the law by imprisonment only; and that punishment is, without doubt, looked to with as much apprehension and fear, and felt as severely by the slave as it is by the freeman.

But, although the difficulty above mentioned, will arise in passing the sentence of the law, where both fine and imprisonment are imposed, yet that circumstance will not justify the court in departing from the sense and meaning in which the word *persons* is used in the Constitution; especially when it is obvious that the whole object and purpose of this act of Congress would be defeated if the word *person*, as used in it, was held not to embrace a person who was a slave.

Nor do we doubt the authority of Congress to pass this law. It is true that no compensation is provided for the master for the loss of service during the period of imprisonment. But the clause in the 5th amendment of the Constitution, which declares that private property shall not be taken for public use without just compensation, cannot, upon any fair interpretation, apply

to the case of a slave who is punished in his own person for an offence committed by him, although the punishment may incidentally affect the property of another to whom he belongs. The clause obviously applies to cases where private property is taken to be used as property for the benefit of the government, and not to cases where crimes are punished by law. And if, in one of those contingencies which sometimes arise in time of war a slave is pressed by the proper authority into the public service in order to be employed as a laborer or teamster, or in any other manner, this clause of the constitution undoubtedly makes it the duty of Congress to compensate the master for the loss he sustains. In such cases and in all other cases where the slave is taken and used as property for the benefit of the government, the government acts directly and exclusively upon the master's right of property; without any reference to the personal rights or personal duties of the slave towards the government. It deals with him as property only, and not as a person, and as it takes property to be used for the public emolument it must pay for it.

But punishment for crime stands upon very different principles. A person, whether free or slave, is not taken for public use, when he is punished for an offence against the law. The public in such cases acts in self-defence to preserve its own existence and protect its members in their rights of person and rights of property. And the loss which the master sustains in his property is incidental, and, necessarily arises from its twofold character, since the slave as a person, may commit offences which society have a right to punish for its own safety; although the punishment may render the property of the master of little or no value. But this hazard is unavoidably and inseparably associated with this description of property; and it can furnish no reason why a slave, like any other person, should not be punished by the United States for offences against its laws, passed within the scope of its delegated authority.

It is not for the Court to say whether the Government is or is not bound, in justice, to compensate the master for the loss of service during the time the slave shall be imprisoned. The question does not depend upon any provision in the Constitution, nor has it been provided for by any act of Congress; and, as the matter now stands, it is a question for the decision of the political department of the Government, and not for the judicial; and, consequently, is one upon which this Court forbears to express an opinion. It would seem from the statements in the argument at the bar, that, in different slaveholding States, different opinions upon the subject have been adopted and acted on by the constituted authorities.

In maintaining the power of the United States to pass this

law, it is however proper to say that as these letters with the money in them were stolen in Virginia, the party might undoubtedly have been punished in the State tribunals, according to the laws of the State, without any reference to the Post Office or the act of Congress, because from the nature of our government the same act may be an offence against the laws of the United States, and also of a State, and be punishable in both. This was considered and decided in the Supreme Court of the United States, in the case of *Fox v. the State of Ohio*, 3 Howard, 433, and in the case of the *United States v. Peter Mari-gold*, 9 Howard, 560; and the punishment in one sovereignty is no bar to his punishment in the other.

Yet in all civilized countries it is recognized as a fundamental principle of justice, that a man ought not to be punished twice for the same offence. And if this party had been punished for the larceny in the State tribunal, the court would have felt it to be its duty to suspend sentence, and to represent the facts to the President, to give him an opportunity of ordering a *nolle prosequi*, or granting a pardon. But there does not appear to have been any proceeding in the State tribunals, or under the State laws, to punish the offence. And as the prisoner has been proceeded against according to the laws of the United States, and found guilty by a jury selected and empaneled according to the act of Congress, we see no ground for setting aside the verdict or suspending the sentence.

And the motion is, therefore, overruled.

LIEN OF THE FL. FA.—TRUST DEEDS.

Evans Trustee v. Crouch's adm'r. et als.

In the Supreme Court of Appeals of Virginia. Spring Term, 1859.

A pre-existing debt is, of itself, a valuable consideration for a deed of trust for its security. Such deed, if duly recorded and not executed with a fraudulent intent, known to the trustee or beneficiary, is valid against all prior secret liens and equities and all subsequent alienations and incumbrances.

It is not necessary that it should be executed, or known to the trustee or beneficiaries before the intervention of subsequent claims.

The deed being apparently for the benefit of creditors, their acceptance of it will be presumed.

The term "assignee" in § 3, chap. 188 of the Code, construed to be used in its broad and general sense.

Distinctions between the lien and operation of the *Ca. Sa.*, and the continuing lien given by § 3, chap. 188 of the Code.

The act, Code chap. 188, § 3, gives as to choses in action, a continuing lien after the return day, with the exceptions therein mentioned.

A deed of trust, by an execution debtor, conveying a chose in action to a trustee, for the benefit of creditors, and duly recorded, takes precedence of the lien of an execution; whether the return-day of the execution has passed, or it is still alive in the hands of the officer.

In the year 1825 William & Daniel Kyle & Co. sued out an attachment against Daniel Connelly as an absconding debtor who was indebted to them in the sum of \$1,103 70. A few days after the attachment was levied Connelly conveyed, in trust, the property levied on by the attachment to secure debts due by him to Thomas & Richard Crouch and Baldwin & Ives and others. The attachment was resisted by the beneficiaries under the trust deed but was sustained by the County Court of Amelia. To this decision a supersedeas was obtained and Thomas Crouch, of the firm of Thomas & Richard Crouch, and George Ives, of the firm of Baldwin & Ives, became joint securities on the appeal bond in the sum of \$2,800. The Circuit Court reversed the judgment of the County Court, and from that decision the attaching creditors, Kyle & Co., obtained an appeal to the Court of Appeals. The Court of Appeals reversed the judgment of the Circuit Court and affirmed the judgment of the County Court. The attaching creditors, Kyle & Co., then instituted suit against Thomas Crouch on the supersedeas bond, George Ives, his co-obligor, having in the meantime died; and on the 8th day of June, 1850, judgment was obtained thereon against Crouch, which he compromised by the payment of 1,800 as of the 1st day of October, 1850.

In 1854 Thomas Crouch instituted suit in the Circuit Court in the City of Richmond against the personal representative of George Ives deceased, the executors of his former representative, his widow and children and the guardian of his children alleging that George Ives died seized of a lot of land in the City of Richmond, and that the guardian of his children held certain personal property derived from George Ives' estate. The answers of the defendants admitted that George Ives was entitled to a moiety of a lot in Richmond, and that the guardian of his children had in his possession \$877 09 derived from George Ives' estate.

On the 1st of February, 1855, the Circuit Court, of the City of Richmond, decreed that the estate of George Ives, deceased, was indebted to Thomas Crouch in the sum of \$900, as of the 1st. of October, 1850, on account of the joint debt, which had been wholly paid by Crouch. The lot was directed to be sold and the proceeds of sale \$406 80 were deposited in bank to the credit of the cause and the guardian of Ives' children also deposited in bank to the credit of the cause the further sum of \$737 60 and the costs of the suit.

In May, 1852, Samuel C. Greenhow had obtained a judgment against the said Thomas Crouch and others for \$1,154 90, on which several executions had been issued previous to February 1st., 1855, the date of the decree in favor of Crouch. On the 17th day of February, 1855, a new execution, issued on Greenhow's judgment, which went into the hands of the sheriff of Henrico, at 12 o'clock, M. of that day, and a further execution went into the hands of the sheriff of the City of Richmond on the 19th day of February, 1855.

Thomas Crouch executed a deed of trust for the benefit of certain creditors mentioned therein to Thomas J. Evans, trustee, which was dated the 15th day of February, 1855, and recorded February 17th, 1855, at 2 o'clock, P. M., which deed conveyed all Crouch's interest under the decree of February 1st., 1855.

On the 27th day of February, 1855, Greenhow filed his petition in the suit of Crouch v. Ives' adm'r. et. als., claiming that by virtue of the lien of his executions he was entitled to the fund in the suit as against Evans, the trustee, and praying that Evans be made a defendant.

Evans, the trustee, filed his petition and answer, in which he asserted that Crouch had conveyed to him all his interest in the suit of Crouch v. Ives' adm'r. et. als., by deed dated 15th February, 1855, in trust to secure certain debts due to certain creditors, which deed was recorded on 17th February, 1855, at 2 o'clock, P. M., and insisted that the execution in the hands of the sheriff of Henrico, though two hours earlier than the re-

cordation of the deed to him as trustee, was no lien, as the sheriff of Henrico could not levy process in the City of Richmond. He claimed, as a purchaser without notice for value, that the fund should be decreed to him as trustee.

An agreement was entered of record in the suit that Thomas J. Evans did not know of the existence of the deed until after the deed was recorded; but that it came to his knowledge sometime during the day of its recordation.

On the 22nd day of March, 1855, the Court directed an inquiry to be made before a commissioner as to when the debts embraced in the deed of trust were contracted, and upon what condition, and whether they were contracted upon the faith of and with reference to the debt sought to be recovered in this suit by the plaintiff from the estate of George Ives deceased.

On May 6th, 1855, the commissioner reported that he had issued notice to the parties to appear before him in order to discharge his duties under the decree of March 22nd, 1855, but that no evidence had been furnished him as to when the debts embraced in the deed of trust were contracted, or upon what condition they were contracted, or whether they were contracted upon the faith of or with reference to the debt sought to be recovered in this suit by the plaintiff from the estate of George Ives deceased. The commissioner returned a paper filed with him by M. D. Hoge, one of beneficiaries in the trust deed, in which it was stated that his debt was for the tuition of his children, and that Crouch had several times stated to him that he intended to secure it out of some claim due to him.

On the 13th of June, 1856, the Circuit Court of the City of Richmond decided that Greenhow, the execution creditor, was entitled to the fund in bank to the credit of the cause, amounting to \$1042 72, and that he or his counsel should check for the same.

To this decree Evans, trustee, applied for and obtained a *supersedeas*.

Nance & Williams for appellants.

The decree is erroneous as it decides that an execution binds the personal property of the debtor not capable of being levied on, although it has been assigned to a trustee to secure *bona fide* debts, due to persons without notice of such executions.

The 3rd section of chap. 188, Code, provides "that every writ of *fieri facias*, hereafter issued, shall, in addition to the effect, which it has under chap. 187, be a lien from the time that it is delivered to the sheriff or other officer to be executed upon all the personal property of or to which the judgment

debtor is possessed or entitled (although not levied on nor capable of being levied on) *except*, in case of a husband or parent, such things as are exempt from distress or levy, by the 34th section of chap. 49, and except that as against *an assignee of any such estate for valuable consideration*, or a person making a payment to the judgment debtor, *the lien by virtue of this section shall be valid only from the time that he has notice thereof*. This section shall not impair the lien acquired by an execution creditor under chap. 187. Chap. 187 makes a *fieri facias* a lien on all the personal property of the debtor levied on before the return day of the execution from the time it reaches the officers hands. By § 3 of chap. 188, the lien created by chap. 187 is extended so as to be a lien from the time that it is delivered to a sheriff or other officer to be executed, upon all the personal estate of or to which the judgment debtor is possessed or entitled, (although not levied on nor capable of being levied on under that chapter except in the case of a husband, &c., "and except that as against an assignee of any such estate for valuable consideration, or a person making a payment to the judgment debtor, the lien by virtue of this section shall be valid only from the time he has notice thereof.

The only questions to be considered then are: First—were the trustee Evans and the beneficiaries under the deed assignees? Second—if assignees were they assignees for valuable consideration, and lastly—did they have notice of Greenhow's execution before assignment?

In Burrill on assignments, page 1st, we find that "an assignment is a transfer or setting over of property or of some right or interest therein from one person to another. In Black. Comm's. it is said that an "assignment is properly a transfer or making over to another of the right one has in any estate." Burrill, p. 3, "an assignment in mercantile transactions embraces transfers by ways of security for or in payment of debts." It seems to imply the condition of debtor and creditor. Burrill, p. 4. "It may be either directly to the creditors or to trustees for their benefit." Thus a debtor may assign a certain article or portion of his property directly to a creditor by way of absolute payment or as a security for his debt, or he may make a more formal and general assignment embracing either the whole or some considerable portion of his property either directly to his creditors or to trustees for their benefit. According to these definitions the deed to Evans is an assignment and Evans an assignee. Is the assignment upon valuable consideration? Burrill says, p. 219, "there can be no question whether an assignment of a debtor's property to a trustee for the benefit of his creditors is for a valuable consideration or not, because

the debts due to the creditors constitute a valuable consideration in the highest sense of the terms." In *Shipwith's ex'or. v. Cunninghams* 8 Leigh, 272, and *McCullough v. Sommerville*, 8 Leigh 415, the Court of Appeals authorizes the preferring of one class of creditors over another, and decides that "it is entirely fair and legal for a debtor in failing circumstances to prefer in payment one joint creditor or one set of creditors over another." It is clear then that Evans, the trustee, is an assignee for valuable consideration. The debts secured by the deed of trust are for money loaned or goods sold. No suggestion even is made as to their fairness, nor is any suggestion that the trustee, Evans, or the creditors secured in the deed had notice of Greenhow's executions until after the deed was recorded and the trust accepted by Evans. Evans then comes fully within the exception of an assignee for valuable consideration without notice. The lien of the execution should therefore have been postponed to that of the trust deed.

H. A. Claiborne for appellee.

The single question in this case is whether the executions issued by Greenhow upon his judgments have priority of lien upon a chose in action over the trust deed from T. & R. Crouch of February, 1855, the executions of 1853 being of course returned, and that of 1855 being in the sheriff's hands when the deed of trust was delivered to the clerk.

1. This brings up the point whether as against these executions the trustee, Evans, is *an assignee for value without notice* under the reservations and exceptions contained in the 3rd sec. of chap. 188 of the Code, p. 717.

This question has never been directly decided in Virginia.

That section was intended to give to the creditors all that a *ca. sa.*, executed, would give him, as it abolishes the *ca. sa.*, and substitutes the remedies of that chapter for it—see *Purveyar v. Taylor*, 12 Grat., 401, which decides that a *fi. fa.* is a lien upon all the personal estate of the debtor including debts due him, and that the lien continues after the return day of the execution."

Greenhow's executions of 1853 and 1855 were therefore liens after the return day upon the chose in action or debt in question. The deed of trust, under which the appellant, Evans, claims the funds, was delivered to the clerk *two hours* after the execution of 1855 reached the sheriff's hands, and neither the trustee or creditors knew of the deed's existence until after it was recorded. Evans, the trustee, was not therefore such an assignee for value without notice, as is contemplated by the 3rd sec. of

chap. 188. That act was intended to protect *bona fide* purchasers who paid value at the time of the assignment, without notice of an execution, and not to give priority to a trustee under a deed made in favor of creditors who had not paid a dollar on the faith of the fund, who had old debts *not operate*, on which they had not even obtained judgments and evidently designed to wrong and cut out the execution creditor. As between the parties themselves that deed was an assignment, but as to Greenhow it was a mere trust deed, and if so, it created nothing but a race between the execution creditor and the creditor in the deed. The Code, Sec. 5, p. 508, provides that trust deeds shall be void as to creditors except from the time of record, and the Court of Appeals hold in *McCance v. Taylor*, 10 Watt, 580, (see Judge Samuels opinion,) that a trust deed is to be treated *as if not made*, so far as other creditors claim, until *delivered to the clerk*.

Should not the execution creditor be treated as being prior in time, and therefore prior in right as being at least equal in equity and prior in law?

The trust deed is a *nonentity* until delivered to the clerk—the trustee a mere conduit—and the deed has *no vitality* until delivered to the clerk—it is not an absolute assignment or transfer, but a conveyance which has no vital spark until delivered to the clerk. No decision can be produced by which such deed has been allowed to over-ride the lien of an execution accrued before the deed was delivered or reached the record.

Look at the monstrous results of this doctrine!—if this deed has priority, it enables any debtor after a vigilant and active creditor has put his execution in the hands of the sheriff to go without consultation with trustee or creditor, secured by the deed, and put a deed of trust on record, securing debts never contracted upon the faith of the fund in dispute, and thus defeat the execution lien! And yet if there be an execution in the sheriff's hands against A and he sell a slave or horse to B, the execution [under the provision in the 3rd sec. of chap. 188, which declares that this section shall not impair a lien acquired under chap. 187] is a lien on the horse or slave although B had no notice of it!

Why should the purchaser of the slave or horse get a bad title and the assignee, under the trust deed, get a good one?

The lien of an execution is a substitute for the *ca. sa.* executed, and the *ca. sa.* executed vested the sheriff with all the right of the debtor, whether waved in the schedule or not—see *Shurley v. Long*, 6 Rand. 735. Evans, the trustee, must therefore be regarded as a mere naked trustee, without priority in law, and with not even an equal equity. A court of equity will not, in tenderness to due set of creditors, construe a trust deed to be a

prior assignment, and thus work injustice to another set, especially when, as in this case, the creditors failed when summoned before the commissioner to show that their debts were contracted upon the faith of the fund.

2. It is conceded that, under the decisions in *Clark v. Ward*, 12 Gratt. 440, and *Wickham, Goshorne & Co. v. Lewis, Martin &c.*, 13 Gratt., 427, a trustee may be a purchaser for value, without notice, under some circumstances—those cases are clearly distinguishable from ours. In the first case, *Clark v. Ward*, the creditor *had in lien before* the assignment was made—in the other case the vender of goods tried to reclaim them *after* they were conveyed to a *trustee without notice*—there the vender had *no lien*. In all the cases where priority is given to a trust deed over attaching or execution creditors, as in those cases, it will be found that the party claiming against the assignment *had no legal lien*.

3. Such an abuse of this statute as is now sought to be maintained is against reason and natural justice. How could the execution creditor give the notice of the lien? Could he do it by publication in the newspapers? Will the law compel a party to do a vain and impossible thing? Can it be tolerated that a debtor shall go, *mala fide*, and put an assignment on record whenever he finds an execution in the hands of the sheriff?

This new statute is remedial—it is designed to be a substitute for the *ca. sa.*, as the court held in *Puryear v. Taylor*, if so it should be liberally construed so as to advance the remedy, and where the case is without the meaning of the law, it shall be construed to be out of the purview, nor shall a saving clause in a statute be construed so as to overturn its purview. See *Dwaris on Statutes*, 9 Law. Lib. marginal pages, 718-723-4-5 and 756-765.

The construction contended for virtually puts an end to the ability of a creditor, (already hemmed in by every disability from the favor shown by our statutes to debtors,) to create a lien upon a chose in action by execution. The debtor may always interpose a trust deed and turn the creditor over to the proof of an impossibility, that is, that the assignee had notice of the execution. This is virtually to offer a premium to fraud and to give every advantage to the unjust and vindictive debtor over the honest and fair creditor.

It is submitted that the trustee, Evans, is not entitled to protection under the statute referred to.

Nance & Williams in reply.

The legislature never designed and has not made the lien of the *fi. fa.* as broad as that of the *ca. sa.* As the law stood, im-

mediately prior to the code, a *ca. sa.* executed, was a lien on all the property of the debtor. An alienation by him, unless for the benefit of his creditor, was absolutely void as to such creditor. He was in prison and nobody could deal with him without notice. He was like a lunatic in an asylum, a married woman, or an infant, with whom nobody could trade except at their peril. No mischief could ensue.

In making the code, the revisors and the legislature abolished the *ca. sa.*, and extended the lien of the *fi. fa.*, but did they give it so broad a range as the *ca. sa.* had? If so, great mischief has been done, and trade and commerce will be greatly impeded. For the debtor is no longer in prison, but is turned loose upon the country to trade and traffic as he pleases, whilst a returned *fi. fa.* which sleeps in some office, perhaps a distant one, is a lien on all of his personal property. He may sell a *chose* in action or a mule or a slave, pocket the money of an innocent purchaser and the creditor may then, by virtue of his returned *fi. fa.*, subject the property in the hands of the holder. The legislature, seeing the mischief which must ensue from giving so extensive a lien to the *fi. fa.*, have given it a more restricted scope. In the third section of chap. 188 of the Code, the writ of *fieri facias* is made a lien from the time that it is delivered to the sheriff or other officer to be executed upon all the personal estate of, or to which the judgment debtor is possessed or entitled, although not levied on nor capable of being levied on, with four exceptions, as follows: 1st. Such things as are exempt from distress or levy in the case of a husband or parent. 2d. As against an assignee of such estate, for valuable consideration, without notice. 3d. A person making payment to the judgment debtor without notice. 4th. The lien acquired by an execution creditor, under chap. 187, shall not be impaired.

It will thus be seen, by the very terms of the Code, that the lien of the *fi. fa.* is now as broad as that of the *ca. sa.* Nor is the case of *Puryear v. Taylor*, 12 Grat. 401, at all in conflict with this view. For in that case, the counsel in their argument and the court in its opinion, expressly mention the exceptions in the Code. The revisors in a note to chap. 170 of their reports, p. 843, say that they "will not undertake to say that the remedies proposed to be substituted in the place of the process to take the body, will in every possible case attain for the creditor every thing that he can attain by means of that process." It seems, therefore, to be clear, that there are exceptions to the lien of the *fi. fa.*, which did not exist as to the *ca. sa.*

Does this case come under any of the exceptions? It seems to come directly within the terms of the 2d exception. The deed from T. & R. Crouch, to Evans, is an assignment, and Evans

is an assignee for value, without notice. For it is not pretended that he had any notice of the executions.

The Code speaks of no particular kind of assignee, but uses the word in its general sense. If the legislature had designed to restrict it to any particular kind of assignee, it would have done so. The same reason applies to protecting a party under a trust deed, as under any other species of assignment. This court has decided in Wickham and Goshorn v. Martin & Co., 18 Grat. 427, that a trustee, in a deed of trust, is a purchaser for value. It is the policy of our law to protect purchasers for value. The Code has extended to them every protection. A *lis pendens*, and judgments are required to be docketed, and no violence is done to the spirit of the Code to say that the legislature has not departed in this case from the general policy of our law.

But the counsel for the appellee (Greenhow) insist that if the trust deed prevails, it will lead to monstrous results, because it will enable a debtor to defeat the execution creditor. The counsel admit that an *absolute* assignment, without notice to the assignee, would be good against the execution creditor, and therefore defeat his lien. Is one more monstrous than the other? Is the fact that the lien may be defeated, any argument against the construction contended for by us?

It is insisted that Greenhow's execution was in the hands of the sheriff two hours before the trust deed to Evans was recorded—that the trust deed was a nonentity until it was recorded, and therefore Greenhow has a prior lien. If the property in question was capable of being levied on, and Greenhow had levied the execution before the return day, there would be some force in the argument. But the property was incapable of being levied on, and Greenhow had acquired by his executions previously issued and returned to the office, all the lien which he could acquire by virtue of a *fi. fa.*, so that the execution of 1855, then in the hands of the officer, gave his lien on the property in question no additional virtue. The issuing of that execution was a superfluous act. The trust deed was recorded before Evans had any notice of that or any other execution, and before Greenhow filed his petition in this cause. Thus making the assignment complete.

It is contended that when equity is equal, the law must prevail. Evans' equity is equal to that of Greenhow, and the law says the assignee for value without notice shall take. The fund should therefore be decreed to Evans.

It is said that this is a remedial statute, and should be construed liberally so as to suppress the mischief, but says Judge Cabell, in Foreman v. Loyd &c., 2 Leigh 297, you must not go

beyond the object of the statute, and create new mischief which will require legislation to suppress. The construction contended for by the counsel for the appellee, (Greenhow), would create mischief in restricting trade and commerce, and in putting it in the power of debtors to defraud innocent purchasers.

It is not necessary that either the trustee, Evans, or the beneficiaries should have known that the deed was made at the time of recording. They will be considered as accepting the benefit of the deed, until it is shown that they have repudiated it. *Phippin v Durham*, 8 Grat. 459. *Danse v. Seaman*, 11 Grat. 778-781. It is not pretended that the debts in the deed are not *bona fide*. The account ordered by the court seems to concede that fact. T. & R. Crouch have preferred one class of creditors to another, and this court has repeatedly held that a creditor has such a right, and that such a deed is not fraudulent for that reason.

The decree of the Circuit Court should be reversed with costs, and the fund decreed to be paid to the trustee.

MONCURE, J. delivered the opinion of the court.

The Code chap. 188, § 3, p. 717 provides that "every writ of *feri facias*, hereafter issued, shall, in addition to the effect which it has under chap. 187, be a lien from the time that it is delivered to a sheriff or other officer to be executed, upon all the personal estate of, or to which the judgment debtor is possessed or entitled, (although not levied on nor capable of being levied on under that chapter,) except in the case of a husband or parent, such things as are exempt from distress or levy by the 34th sec. of chap. 49, and except that as against an assignee of any such estate for valuable consideration, or a person making a payment to the judgment debtor, the lien by virtue of this section shall be valid only from the time that he has notice thereof. This section shall not impair a lien acquired by an execution creditor under chap. 187."

The controversy in this case arises under this section of the Code. The subject of controversy is a chose in action, which belonged to Thomas and Richard Crouch. The appellee, Samuel O. Greenhow, claims a lien upon it under the said section by virtue of sundry writs of *feri facias* issued after the Code took effect, upon a judgment obtained by him against Edwin Farrar and the said Thomas and Richard Crouch. The appellant claims a lien upon it by virtue of a deed of trust executed by said Thomas and Richard Crouch and duly recorded, whereby they assigned the subject to him, in trust to secure the payment, as therein mentioned, of certain debts of theirs named in a schedule annexed to the deed. And though the said Green-

how's execution lien is prior *in time* to the appellant's deed of trust lien, yet the appellant insists that the latter is prior *in right*, in as much as he is an assignee for valuable consideration and without notice within the meaning of one of the exceptions contained in the section giving the execution lien as aforesaid. The question is, therefore, narrowed down to this; whether he is such an assignee or not?

The deed of trust is certainly an *assignment* of the subject in controversy, and the appellant is therefore an assignee thereof. He is also an assignee *without notice*. He denies notice in his petition and answer, and there is no proof or even averment of such notice in the record. Is he an assignee for *valuable consideration*?

A pre-existing debt is, in itself, a valuable consideration for a deed of trust, executed for its security, which deed, if it be duly recorded, and was not executed with a fraudulent intent, known to the trustee, or the beneficiaries therein, will be valid against all prior secret liens and equities and all subsequent alienations and incumbrances. It is not necessary to the validity of the deed that it should be executed by the trustee or the beneficiaries; or even that they should know of its existence before the intervention of subsequent claims. The deed being apparently for the benefit of the creditor thereby secured, their acceptance of it, will be presumed, until the contrary appears. If any of them refuse it their refusal will relate back to the date of the deed and avoid it, *ob initio*, as to them. A debtor, even though he be in failing circumstances, may lawfully prefer one creditor to another, and make a valid deed of trust for that purpose. These principles are now well settled in this State, as the following cases sufficiently show. *Garland v. Rives*, 4 Rand. 2; *Skipwith's exor. v. Cunningham et als.*, 3 Leigh 271; *M. Cullough et als. v. Sommerville*, 3 Leigh 415; *Lewis v. Caperton's exor. &c.*, 8 Grat. 148; *Phippen v. Durham et als.*, 8 Grat. 457; *Dance et als. v. Seaman et als.*, 11 Grat. 778; *Wickham et al. v. Lewis Martin & Co.*, 13 Grat. 427.

In the last case Judge Daniel said; (and in this part of his opinion all the other judges substantially concurred.) "I think it has been the constant course of the courts in this State to regard the creditors in a deed of trust, made by their debtor *bona fide* for their indemnity, in the light of purchasers for value," p. 437.

It is not proved, nor even intimated, that the debts secured by the deed of trust in this case are not all *bona fide* debts, nor that the trustee or any of the creditors participated in, or had notice of, any fraudulent intent on the part of the granters; nor indeed that there was any such intent other than may be

implied by the existence of the execution lien, which was unknown to the trustee and beneficiaries until after the recordation of the deed. No such intent appears on the face of the deed.

The appellant is therefore an assignee for valuable consideration and without notice in the general sense of the terms. Why is he not such an assignee within the meaning of the exception aforesaid? The terms are therein used without qualification or limitation; and the presumption is they were intended to be used in their general and well-understood sense. There is nothing in the nature of the case which requires that they should be construed in a different or more restricted sense.

It is argued by the counsel for the appellee that the additional effect given by the Code to the writ of *fi. fa.* was intended as a substitute formerly afforded by the writ of *ca. sa.*, thereby abolished, and that as the effect of the lien afforded by the execution of the latter writ was to override subsequent alienations, so the delivery of the former to the sheriff for execution should have the same effect, except so far as an intention to the contrary may plainly appear that such an assignment as that under which the appellant claims comes within the meaning of the exception.

It is true that the additional effect given by the Code to the writ of *fi. fa.* was intended as a substitute for the remedy formerly afforded by the writ of *ca. sa.* But it was not intended to be co-extensive with that remedy in all respects. On this subject the revisors observe "we will not undertake to say that the remedies now proposed to be substituted in place of the process to take the body for debt will in every possible case attain for the creditor every thing that he can now attain by means of that process, but we express the opinion, without hesitation, that in cases generally the rights of creditors will be better protected by the measures proposed than by those for which they are substituted." Code, p. 716, note.

The two remedies differ in many respects. The new remedy is more beneficial to the creditor in some respects and less so in others than the old. It gives a lien on all the personal estate of the debtor from the time that the writ of *fi. fa.* is delivered to the officer for execution, subject only to the exceptions enumerated. The lien does not depend upon the levy of the writ, but continues to operate after the return day and until the right of the creditor to levy any execution upon his judgment ceases, or is suspended by a forthcoming bond being given and forfeited, or by a *supersedeas* or other legal process. Code, p. 717, § 4. *Purveyor v. Taylor*, 12 Grat., 401.

On the other hand the *ca. sa.* was a lien only from the time of its execution, and then only a qualified and conditional lien.

It was not a lien at all upon personal estate until by the act of March 2nd, 1821, it was declared that "every writ of *capias ad satisfaciendum* shall bind the property of the *goods* of the party against whom the same is sued forth from the time that each writ shall be levied." Sess. Acts, p. 35, ch. 34, § 4. It is at least doubtful whether even that act made it a lien on choses in action. The language of the act is almost identical with that which declared that no writ of *feri facias*, &c. "shall bind the property of the *goods* against which such writ is sued forth, but from the time that such writ shall be delivered," &c. 1 Rev. Code, 529, § 13. If the word "goods," occurring in each of these two acts, in *pari materia*, be construed to have the same meaning in each as would seem to be reasonable, then as it clearly did not embrace choses in action in the latter, so it did not in the former. Again, the lien of the *ca. sa.* was dependent for its effect upon the debtors taking the oath of insolvency; until then the lien was inchoate and conditional, and if the debtor died or escaped or was discharged without taking the oath of insolvency the lien was thereby determined.

A *ca. sa.* was rarely resorted to until a *fi. fa.* had been tried without effect. So that it was only in the rare cases in which a *ca. sa.* was issued and executed and the debtor took the oath of insolvency that the creditor had the benefit of the *ca. sa.* lien. Effect might be given to such a lien against persons claiming by voluntary act of the debtor without doing injustice to them; for they could not well be assignees *without notice*, while the debtor was in custody. No effect was given to it against liens acquired by other creditors by act of law while he was in custody. *Jackson v. Heiskill*, 1 Leigh, 227, overruled by *Foreman v. Loyd*, 2 Id. 284.

The writ of *fi. fa.* is *generally* issued on a judgment, and *always* in the absence of special direction to the clerk to the contrary. It is to this execution, thus almost *always*, issued upon a judgment that the Code, chap. 188, § 3 has imparted the important additional effect therein mentioned. In giving to the creditor this new and extensive remedy it was eminently proper, so to guard it, as that it should do no injury to the just rights of others. Accordingly it was given, subject to certain exceptions, which the legislature supposed would have that effect, and which are reasonable and ought to be fairly construed. Among them is the exception in favor of an assignee for valuable consideration and without notice. The propriety of this exception so far as it applies to an assignment for value paid at the time is not denied. Nor will it be denied that it applies to an assignment in discharge of a pre-existing debt. But it is contended that the exception does not apply to an agreement for the *security*

of a pre-existing debt. Such an assignment seems to be as well within the *spirit* as the letter of the law. It could never have been intended by the legislature that any assignment for valuable consideration without notice and duly recorded, should be affected by the secret lien of an execution, which may have issued from the court of a remote county of the State, and been years since returnable. Persons dealing with the execution debtor have no convenient means of informing themselves of such a lien and are not bound to make inquiry. A judgment is a lien on the land of the debtor against subsequent purchasers from him; but the law requires it to be registered for their information. It does not require the lien of a *fi. fa.* to be registered, because it did not intend that purchasers for valuable consideration and without notice should be effected by such lien. To give it that effect would not only be unjust to innocent persons, but would very much obstruct the free circulation of personal property, which the public interest requires and the law favors. It will not do to say that an assignee for the security of a pre-existing debt would only be placed in *statu quo*, and would not be injured by being deprived of the benefit of his lien. He may have reposed on that security and been thereby prevented from seeking satisfaction in any other way. At all events having obtained that security *bona fide* he ought not to be deprived of it, and is fairly entitled to all the advantages to which he would be entitled in any other case as a *bona fide* purchaser for value without notice.

But it is argued that if this be the case a debtor may always avoid execution lien by making an assignment for the benefit of other creditors. And so it may as well be said that he may, by making an absolute assignment for value paid at the time, or by receiving debts due to him from persons having no notice of the lien. The law has afforded to the judgment creditor as ample remedies as possible, consistent with the rights of others, to enforce the satisfaction of his judgment. It has made his judgment a lien on the whole real estate of the debtor. It has made his *fi. fa.* a lien from the time that it is delivered to the officer to be executed on all the personal estate of the debtor on which it is capable of being levied and is actually levied before the return day, which lien overreaches all intermediate alienations and incumbrances, with or without notice. And it has, in addition to that effect, made it a lien, from the same time, on all the personal estate of or to which the judgment debtor is possessed or entitled, (although not levied on, nor capable of being levied on as aforesaid,) subject only to the exceptions mentioned; and it has provided as ample means as possible for the enforcement of this last mentioned lien, by enabling him to compel the

debtor to discover and surrender his estate, and to compel any other person on whom there is a liability by reason of said lien to discharge such liability. By resorting to and pursuing with diligence these means or some of them, the creditor is generally able to prevent an evasion of his execution lien, and if he be not always able to do so, it is only because the rights of others, which the law regards as superior to his, stand in his way.

It is further argued that as one of the executions of the appellee was in the hands of the sheriff and in full force when the deed was recorded, and when the appellee filed his petition in this case, the lien of that execution is therefore superior to the lien of the deed of trust, though the lien of the other executions, of which the return day had passed, might be inferior thereto. The subject in controversy being a chose in action is incapable of being levied on, under chap. 187 of the Code, and a lien upon it, by execution, could therefore be acquired only under chap. 188. Under the latter it is immaterial whether the return day of the execution be past or not. In each case the lien exists and to the same extent. It may be proper to observe here that the deed of trust was recorded before the appellee filed his petition aforesaid or the suggestion therein referred to.

It is further argued that the appellee has at least equal equity with the appellant and the legal right, or at all events a prior equity, and ought therefore to prevail in this controversy. If it can be said that he has equal equity it cannot properly be said that he has the legal right. The law under which he claims expressly excepts an assignee for value and without notice, so that such an assignee, and not the execution creditor, has the legal right. As between them, there is no execution lien on the subject, and the debtor had the same right to make the assignment, as if the execution never had issued.

The Court is therefore of opinion that the appellant is entitled to the fund in controversy, and that the decree be reversed, with costs, and the cause remanded to be further proceeded in accordingly.

EQUITY. DEED. TRUST. ALIEN. ESCHEAT.

*Randall, Trustee for the creditors of James Swan v. David Jaques et al.**

In the District Court of the United States, for the Western District of Virginia, holden at Clarksburg, 1857.

A private Act of Assembly construed: it did not confer a mere *power*, which dies with the person, beyond remedy even in a Court of Equity, but clothed with a *trust*, the execution of which, on the death or default of the trustee, a Court of Equity is competent to enforce by the substitution of another.

In a suit brought for that purpose in the proper Court in the County where the trust land lay, the Court having entertained jurisdiction, its decree, though all the parties in interest may not have been duly convened, is so far conclusive that its validity cannot be colaterally questioned in another tribunal.

A deed executed by an Attorney in fact, although he be duly authorized, and although also it be manifest on the face of the deed, that it was the intention of the grantor to execute the power, by conveying the title of the principal, yet will not be the deed of the principal, unless the attorney shall either sign the name of the principal, with a seal annexed, stating it to be done as attorney, for the principal, or, sign his own name, with a seal annexed, stating it to be for the principal.

The title to land having under a special Act of Assembly been held in trust by an unnaturalized alien, upon his death in 1842, his next of kin being also all unnaturalized aliens, it was subject to escheat; but the commonwealth not consummating her title by inquest and office found, and a decree of a competent Court of Equity in a suit brought for the purpose by the next of kin of the deceased trustee, though it directed a conveyance by a commissioner only of the title of such next of kin, yet having appointed a new trustee and in terms vested in him, the title of which the former trustee died seized, is valid for the latter purpose, and vested said title by its direct operation.

A deed, though void as an executed contract at law, yet held to be valid as an executory contract in Equity; and being otherwise a sufficient foundation for a bill for specific performance, *held* further, that Equity will allow a bill for foreclosure, brought on said deed on the hypothesis that it was valid as a mortgage, and to which a demurrer must otherwise be sustained, to be converted, by amendment, into a bill for specific performance.

Vendor of land retaining title as security, his action, or that of the assignee, to subject the land in equity to the satisfaction of the purchase money, can not be defeated by the operation of the statute of limitations, whether the objection arises on demurrer or by plea.

* This report, was forwarded to us some two years since, but owing to the neglect of the bearer of the manuscript, never reached us until a few days since.—[Ed.]

Upon a contract to pay a sum certain in an *indefinite* quantity of cattle and horses, after the day of payment, an action of debt lies, and not merely an action sounding in damages.

The facts of the case are so fully detailed in the opinion of the Judge, that any further statement of them is deemed unnecessary.

BROCKENBROUGH, J.

The complainant, a citizen of the State of Pennsylvania, has filed his bill on the Equity side of this Court to foreclose a mortgage executed on the 3d day of November, 1840. The principal defendants, N. J. Wyeth, C. J. Wyeth and Helen Wyeth, without answering, having demurred generally to the bill, assigning several special grounds of demurrer. The proper solution of the questions arising on the demurrer, requires a full statement of the material facts on which the complainant grounds his demand for a decree of foreclosure. Those facts as detailed in the bill, and modified by the exhibits, must be assumed to be true, since the demurrer in Equity, as well as at law, admits the truth of all facts alleged in the adverse pleading, which are sufficiently pleaded; and assuming them to be true, to this extent, denies their sufficiency in law, or Equity, to entitle the adversary to the relief he seeks.

On the 30th day of December, 1795, a patent was issued by the State of Virginia to Thomas Wilson for sixty thousand acres of land, situated on the waters of Buckingham river, in Randolph county, in said State. On the 1st day of January, 1796, the patentee, Wilson, sold and conveyed the entire tract, covered by the patent, to one James Swan, then a citizen of Massachusetts. Some thirty years, or more, before the institution of this suit, the said James Swan established his residence in the city of Paris, in France, and resided there until his death, which occurred prior to the year 1838. During his residence, he contracted many debts and died there, largely indebted to the government of France, and to many of her citizens. While he resided in France, his lands acquired by his purchase from Thomas Wilson, became forfeited to the Commonwealth of Virginia, for the non-payment of the taxes due thereon. In the winter of 1838, the French creditors of the said James Swan, applied to the Legislature of Virginia for relief against the forfeiture of the lands of Swan to the State; and the Legislature on the 15th day of March, 1838, passed an act transferring to John Peter Dumas, of France, in trust for the use and benefit of the creditors of Swan, all the right, title and interest of the Commonwealth, or of the President and Directors of the Lite-

rary Fund, to any lands owned by the said Swan, giving to the said Dumas, or to his legally constituted attorney in fact, authority to sell the lands. The title of these lands having become vested in the President and Directors of the Literary Fund, prior to the passage of the special Act of the Legislature above referred to, the effect of the Act was to transfer the legal title to the lands to the said Dumas, to be held by him in trust, for the use, and benefit, of the creditors of Swan, and to be disposed of, for the purpose of applying the proceeds to the discharge of their claims.

By virtue of the provisions of this act of the Legislature, John Peter Dumas constituted Antonio F. Picquet of Bristol, in the State of Pennsylvania, his attorney in fact, to sell and convey said lands. On the 3d day of November, 1840, Picquet, as attorney in fact for Dumas, sold and conveyed the tract of land in question, to one David Jaques, a citizen of Virginia, residing in Harrison county, and within the Jurisdiction of this Court, for the sum of \$12,000, payable in cattle or horses, in ten annual payments thereafter, with interest on the last five payments. To secure the payment of the said purchase money, Jaques made to Picquet his promissory note for the said sum of money, payable as above specified in cattle or horses, on the 3d day of November, 1840; and on the same day executed a mortgage deed, in favor of Picquet, to secure the payment of the purchase money. These deeds and note, are filed as exhibits with the bill. The deeds were recorded in the Clerk's office of Harrison county, but were not recorded in Randolph county, where the lands were situated. Some time after the purchase, David Jaques sold and conveyed a portion of the said tract to Samuel W. Powell, a citizen of Maryland, who knew that the purchase money was unpaid; and Powell conveyed the land so purchased by him to the Wyeths, citizens of New York.

The whole purchase money for the land, sold by Picquet to Jaques, is in arrear and unpaid. Picquet died a few years ago, in Pennsylvania, and the county Court of Harrison county, Virginia, appointed Abia Minor, (a citizen of Virginia, and Sheriff of Harrison county,) administrator of said Picquet. The said administrator declined to institute any proceedings at law or Equity, to collect the debt due from Jaques. Picquet left only one heir at law, his niece Augusta C. M. A. Picquet, who intermarried with Francis Eugene Puget; both natives and residents of France.

John Peter Dumas died in Paris in 1842, leaving children and heirs residing there; and after the death of their father, Emile Dumas, and Charles Dumas, two of his children and heirs at law, exhibited their bill on the Equity side of the Circuit Court

of Kanawha county, Virginia, against the heirs of Picquet and others, praying to have a trustee appointed in place of John Peter Dumas; and on the first day of June, 1855, that Court rendered a decree in said cause, appointing the complainant, Josiah Randall, trustee in the place of John Peter Dumas, deceased, with all the powers and authority which had been vested in the said Dumas by the special Act of the Legislature of Virginia above cited.

Although the promissory note, made by David Jaques, was payable to Antonio F. Picquet, in his individual character, yet the equitable title to the sum of money therein specified, is vested in the creditors of the said James Swan, and should be applied to the payment of their debts; the legal representative of Picquet having no interest therein; and the complainant here insists, that as trustee for the creditors of Swan, (the parties beneficially interested,) he has a right to invoke the aid of a Court of Equity to render a decree of foreclosure, directing the mortgaged subject to be sold for the satisfaction of the purchase money, the mortgagor, Jaques, being unable to pay the same. David Jaques the purchaser and mortgagor of the land; his vendee S. W. Powell, N. J. Wyeth, C. J. Wyeth, and Helen Wyeth, the vendees of said Powell, the children and heirs of John Peter Dumas, and the personal representative and heirs at law of A. F. Picquet, are made defendants, to the bill, which prays a decree for the sale of the mortgaged premises, and for general relief.

The defendant Jaques has answered, admitting all the allegations of the bill; and the personal representative of Picquet disclaims all knowledge of the matters alleged in the bill, and therefore neither admits or denies them. None of the other defendants have answered the bill.

The original patent from the Commonwealth to Thomas Wilson; the deed from Wilson to James Swan; the power of attorney from J. P. Dumas to A. F. Picquet; a transcript of the record of the case decided by the Kanawha Circuit Court, the conveyance and reconveyance and promissory note, executed on the 3d day of November, 1840, between Jaques and Picquet, and the special Act of the Legislature of Virginia, are all filed as exhibits with the complainant's bill.

Various questions arise upon the demurrer, and they have been ably and zealously discussed in the argument at the bar. They will be severally considered. The validity of the proceedings of the Circuit Court of Kanawha, resulting in a decree constituting Josiah Randall trustee in lieu and stead of John Peter Dumas, deceased, is impeached by the demurrants. They insist, through their counsel, that the State Court exercised an

usurped jurisdiction ; that its proceedings cannot affect the demurrants, who were no parties to the cause, and that the decree is a simple nullity. This objection, if well taken, destroys the foundation of the complainant's demand for the relief prayed in his bill, since he has no other authority or right to be entertained here, than that which he derives from the decree of the Kanawha Court.

The general question of the power of a Court of Equity to substitute one trustee for another, and the extent of that power, need not here be discussed. It is one of the most familiar doctrines of equity tribunals, that a trust shall never fail for want of a trustee to execute it ; and in every case where the execution of it is obstructed by the death, or incapacity, or unfaithfulness of a trustee, equity beneficently exerts its authority to remove the impediment, by the appointment of a suitable trustee. This large jurisdiction of equity, in cases of trust, is admitted by the counsel for the demurrants ; but it is insisted that the Act of Assembly of the 15th of March, 1838, did not clothe J. P. Dumas with a *trust*, in the proper sense of that term, but conferred upon him a mere naked *power*, which died with the person, beyond the capacity of revival, even by the extensive power of a Court of equity ; that no authority short of the Legislative department, could revive this unexecuted and extinct power. The difference between a trustee, and a mere agent is well established ; the first is clothed with the legal *estate*, the latter is not invested with any *estate* whatever : the first has an *interest* coupled with a *power* ; the latter a power uncoupled with any interest. Now if the State, by its legislative action in the case at bar, constituted John Peter Dumas her agent, merely, with authority to distribute her bounty among certain beneficiaries, retaining her *estate* in the lands which had vested in her by the forfeiture for the non-payment of taxes, that agent had a mere power and his death worked a revocation of it, and no authority short of the sovereign power which had originally delegated it, could reanimate it. But if that legislative action constituted Dumas a *trustee*, it invested him with not only a power or authority, but with the complete legal title to the estate, which descended at his death to his heirs at law ; and even if he died without heirs (as he most probably did, being an unnaturalized foreigner, and leaving no descendants, as we may suppose, who were citizens,) though the legal estate would have escheated to the Commonwealth ;* she would doubtless

* The legal title, in such cases, would not now escheat, in Virginia—but this is by virtue of a provision found, for the first time, in the Code of 1849, page 493, § 26—copied from the 4th and 5th Will : iv. ch. 23, § 3, 4, 5.

have held it *subject* to the trust, and not *relieved* of it. 1 Tucker's Com. 65. To determine the just construction of the Act of Assembly in the case at bar, we must critically scan its language. After reciting the fact, that James Swan had died leaving large tracts of land in Virginia, which had become forfeited to the Commonwealth for the non-payment of taxes, and other facts not material to be stated here, the Preamble of the Act reads as follows: "And, whereas, it is represented to the General Assembly that the debts of said estate are chiefly due to officers of the French army, who were in the American service during our revolutionary struggle, or the descendants of such officers, and originated in France after that period, by loans, and advances,—made under the promptings of a generous regard for an American citizen, and fellow-soldier; and, whereas, the heirs of James Swan, impressed with the obligation of their ancestor to the said creditors, released to them all their interest in said estate, and the said creditors in order to realize some portion of the amount due thereon, have placed the subject in the hands of John Peter Dumas, whose agent now here, believing the interest of said creditors will be consulted by abandoning the lands aforesaid, if the taxes and damages thereon shall be exacted for their redemption, appeals to the liberality of the General Assembly for their remission." The act itself then proceeds as follows: "*Be it therefore enacted*, That all the *right, title and interest* of the Commonwealth, or of the President and Directors of the Literary Fund, to any of the lands owned by James Shaw, under title *legal or equitable*, lying West of the Alleghany Mountains, and which have been forfeited to the Commonwealth, or said Literary Fund, for the non-payment of taxes due thereon, or for failing to enter the same on the books of the commissioner of the revenue, and having the same charged with all taxes chargeable thereon, and paying the same with damages, as prescribed by law, shall be, and the same is hereby *transferred to and vested*, except as hereafter excepted, in John Peter Dumas, *in trust*, for the use and benefit of the creditors of James Swan, discharged from all taxes, and damages charged, or chargeable, thereon, before the 1st day of January, 1838." "*Be it further enacted*, That the said John Peter Dumas shall be authorized to hold said land for the use and benefit aforesaid, and that any sale made by him or his legally constituted attorney in fact, of any part or parcel thereof, shall be valid and sufficient to convey the title with which he is hereby invested; *Provided however*, That nothing in this, or the preceding section, shall in any wise affect the right or title of any *bona fide* occupant, whose rights are secured by any pre-existing law."

The language employed both in the preamble and act, is strong and explicit. The reasons assigned for the exercise of this unusual liberality of the Legislature, are in a high degree creditable to that body; and it would be strange if the Courts, in the interpretation of the act, would mar its moral beauty by narrowing its bounty within the limits demanded by the demurrants. When this appeal was made to the liberality of the Legislature, a complete title to lands, once granted by the State, had revested in her, and she generously responded to the appeal made to her magnanimity, by declaring that all her *right, title and interest*, in the lands in question, should be transferred to, and vested in, John Peter Dumas, for the uses and trust expressed in the act. No language could possibly be clearer to express her intention to divest herself of all claim or title to the lands, and to vest it in J. P. Dumas for the purposes specified. The *estate* therefore previously vested in her, was by that declaration of legislative will, transferred to, and vested in Dumas, who thus became a *trustee*, subject to the control and supervision of the Courts of Equity in the administration of the trust. The fact that the trust here was created by a sovereign and not by a citizen, does not at all affect the question. The equitable jurisdiction attaches whenever the relation of trustee, and *cestui que trust*, is created, either by public or private act; for fidelity in the administration of a public charity, emanating from the State, is precisely as important, to the *cestui que trust*, nor more, nor less, as it is in one created by individual liberty. Nor are these views impugned by the case of *Cablis Va. Redout, 7 Gill and Johns*. In that case the powers and duty of a Court of equity to appoint a trustee, in any of the contingencies we have referred to, was broadly affirmed by the court, but the application of it to that particular case, under its peculiar circumstances, was denied. The manner in which the commissioners should execute the trust in that case and fill vacancies occurring in their body, was very specially pointed out in the act of Assembly; and the appellate court held, that the chancellor below erred in removing the commissioners named in the act, and appointing a trustee in their place. It is enough to say that no such special circumstances exist in the case at bar. Having thus seen that the act of Assembly, which has been cited, created a clear trust and that in the event, which occurred, of the death of the trustee, it was competent for a Court of Equity to appoint another trustee to execute the trust, we are next to inquire whether the Circuit Court of Kanawha could rightfully exercise jurisdiction for this purpose. The plaintiffs in that case were two of the sons and heirs at law of John Peter Dumas, and the defendants, were the other co-heirs of the same ancestor, the French creditors of

James Swan, and the heirs, and personal representative of A. F. Picquet. None of the parties, plaintiffs or defendants, resided in Virginia, but a portion of the Swan lands, the title to which had been vested in John Peter Dumas as trustee, by operation of the act of Assembly, were located in the County of Kanawha: and this fact is recited in the proceedings in the cause, as the foundation of the jurisdiction exercised by the chancellor. The demurrants insist that they should not be affected by a decree to which they were not parties; but as the State Court had clear jurisdiction in the cause, the omission to make the demurrants parties in the suit was an error (if an error at all—and I do not intend to intimate an opinion that all the proper parties were not convened before that court,) which this court cannot collaterally enquire into. "Where a court has jurisdiction, it has a right to decide every question which occurs in the case, and whether its decision be correct, or otherwise, its judgment, until reversed, is regarded as binding in every other court; but if it act without authority, its judgments and orders are nullities." *Williamson v. Barry*, 8 How. R. 541, S. C.; 17 *Curtis* 681; *Baylor's Lessee v. Dejarnett*, 13th *Grat.* 173.

This court must therefore hold that the appointment of the complainant here as trustee in lieu of John Peter Dumas, deceased, by the Circuit Court of Kanawha county, was regular and valid.

I am next to consider the effect and operation of the transactions of the 3d of November, 1840, between A. F. Picquet and David Jaques. These consist 1st of a deed from Picquet to Jaques, purporting to convey the tract of 60,000 acres in fee simple, in virtue of a power of attorney executed by John Peter Dumas to A. F. Picquet, constituting him his attorney with power to sell and convey the said lands; 2d, of a deed from Jaques to Picquet, called in the instrument itself, a mortgage deed, and purporting to have been made to secure the purchase money for the land according to the tenor and effect of the contract between the parties, as expressed in the note given by Jaques for the purchase money; which note is described in this deed, as a bond or writing obligatory, but is in fact an unsealed promissory note; 3d, of the last mentioned note, by which Jaques promises to pay to Picquet \$12,000, in ten annual payments, in horses and cattle. Several important questions arise on this branch of the case, and they will be severally considered.

The deed from Picquet to Jaques, describes the former as agent for John Peter Dumas, but the conveyance itself, and all the covenants thereof, are in the name of the agent Picquet, and the deed is signed and sealed by A. F. Picquet without the

usual addition of the words, "attorney in fact," for J. P. Dumas, or any equivalent words. The legal title to land cannot pass from him who has it but by his deed; such deed may be executed either by himself directly, or, by his attorney, duly authorized for the purpose. But it must be so executed as to be the deed of the principal. It is not sufficient, therefore, that it shall be executed by the person who was authorized to make it; but it must be done by him, as attorney. For this purpose, it is necessary that the attorney shall either sign the name of the principal, with a seal annexed, stating it to be done as attorney for the principal; or, he may sign his own name, with a seal annexed, stating it to be for the principal. In either of these forms, the deed becomes the deed of the principal, and if every thing else be correct, it conveys the title of the principal. But if the deed be signed and sealed by the attorney, neither in the name of the principal, nor in his own name as attorney for the principal, it is not the deed of the principal. This was decided as early as the 6th year of the reign of Queen Elizabeth, (Moore's Rep. 70,) and has been uniformly recognized ever since. *Martin v. Flowers*, 8 Leigh 161-2; *Lessee of Clarke, et. al. v. Courtney et. al.*, 5 Peters 349. The case of *Martin v. Flowers*, is precisely identical with the case at bar, and is not affected by the subsequent cases of *Shanks et. al. v. Lancaster*, 5 Grat. 110, and *Bryan v. Stump*, 8 Grat. 241, in both of which latter cases the deed executed by the attorney in fact, was held to be the deed of the principal. The authority of *Martin v. Flowers*, therefore, is quite decisive of the point here. The inconvenience resulting from the rule of the common law, that a deed signed and sealed by the attorney only in his individual name, is not the deed of the principal, though it be manifest on the face of the deed that it was the intention of the grantor to execute the power by conveying the title of the principal, has led to an abrogation of the rule in Virginia, but the act of Assembly annulling it, is more recent than the deed we are now considering. Code of Va. (of 1849) p. 500, § 3.

It is clear, then, that the legal title to this tract of land, did not pass by the deed from Picquet to Jaques, but continued in J. P. Dumas, up to the period of his death. J. P. Dumas was seized of the fee simple in these lands, though no words of inheritance were used in the act of Assembly clothing him with the trust, the common law doctrine that words of inheritance were indispensable to the creation of a fee, having been changed in Virginia, by the act of 1785, re-enacted in the Code of Va., p. 501, § 8. Then what became of the legal title on the death of J. P. Dumas? It is descended to his heirs at law, it has been conveyed by them to the complainant, under the su-

thority of the Circuit Court of Kanawha, through the instrumentality of a special commissioner appointed by the Court for the purpose of making the conveyance on their behalf, and in their name; as appeared by the record filed as an exhibit here. That deed purports to convey the legal title to Josiah Randall; but I do not suppose that it had any such effect. The next of kin of J. P. Dumas, were all unnaturalized aliens, and though an alien may *take* real estate *by his own act*, he cannot do it *by act of law*, for the law, *quæ nihil facit frustra*, never casts a title by descent on one who cannot hold it. *Jackson v. Saunders*, 2 Leigh, 199. The legal title, therefore, was subject to escheat, but the Commonwealth did not consummate her title by inquest and office found, and had she done so, I do not doubt that she would have held the legal title subject to, and not relieved of the trust, as I have elsewhere intimated. The legal title, according to my view of the subject, was transferred to Josiah Randall, by the direct operation of the decree of the Circuit Court of Kanawha, which declares that "he is hereby appointed trustee for the creditors aforesaid," (i. e. the creditors of James Swan,) "in the place and stead of John P. Dumas, deceased, and that, as such trustee, he stands seized of all the lands of James Swan, deceased, which were transferred to and vested in said J. P. Dumas by virtue of the act aforesaid, except such portions thereof as may have been sold and conveyed by the said J. P. Dumas in his lifetime in the execution of the trust." The legal title, then, is now vested in Josiah Randall as fully and effectually to all intents and purposes as it was vested in Dumas by the act of the Legislature.

We have seen that the deed from Picquet to Jaques, was inoperative to pass the legal title, and was a mere nullity in law. Will it be so regarded in equity? By no means. Though void as an executed contract at law, it is nevertheless valid as an executory contract in equity. The two instruments from Picquet to Jaques, and *e converso*, taken together, clearly manifest the intention of the contracting parties to convey by way of deed of bargain and sale on the one hand, and to reconvey, by way of mortgage, on the other. The fairness of these transactions is not impeached, and the contract thus entered into is a sufficient foundation for a bill in equity for specific performance by either party, according to their respective rights. But the bill here, being framed upon the hypothesis that the deed from Picquet to Jaques conveyed the legal title, prays for a decree of foreclosure of the mortgage executed by Jaques to Picquet to secure the purchase-money. It is clear that this bill cannot be sustained as a bill for foreclosure as the legal title is in the complainant, and he has not tendered a conveyance of it. The

case then made by the plaintiff, in its present shape, is not sufficient, in equity, to entitle him to the relief he seeks, and the demurrer must be sustained. But, as there is clear equity on his side, leave will be given him to amend his bill for a foreclosure of a mortgage, by turning it into a bill for specific execution of an executory contract. I think this course is sanctioned by the general course of equity practice, and by the Court of Appeals of Virginia, who allowed a complainant so to amend his bill as to convert it from a bill praying specific execution of a contract, into a bill for rescission of the same contract. *Panill v. McKinley*, 9 Grat. 1. See 1 Daniels, Ch. Pr. 517-19, marginal page.

It was insisted in the argument, by the counsel for the demurrants, that no recovery could be had here, because it appeared upon the face of the complainant's case, that the contract which he seeks to enforce was a mere parol contract, and that it was fully due more than five years before the institution of this suit; that courts of equity, equally with a court of law, applied the statute of limitations; and that where it appeared on demurrer to a bill in equity, that the complainant's demand was such that a plea of the statute of limitations would bar the plaintiff's action at law, the demurrer must be sustained. The general propositions contended for, are sustained by high authority. Story's Eq. Pl. § 503, 751. But while it is generally true that the statute of limitations will avail a defendant in equity, as well as at law, it is not universally so. In cases of concurrent jurisdiction, the court of equity applies the statute as rigidly as the court of law, the maxim *equitas sequitur legem*, being strictly applicable in all such cases. But in cases of pure trusts, cognizable only in equity, the statute has no application. In the case at bar, the legal title was retained in the vendor, whether it was conveyed by the deed from Picquet as agent of Dumas to Jaques or not; if it was so conveyed, it was reconveyed at the same time by Jaques to Picquet, for the benefit of his principal, by his mortgage deed; and these acts being simultaneous, must be regarded as parts of one entire transaction. See *right on d. of Gilliam v. Moore*, 4 Leigh, 30. *Wheatley v. Calhoun*, 12 Leigh, 264. Upon this hypothesis, though Jaques was seised, he was so for a transitory instant only, and this was equivalent to a retention of the legal title in Dumas. If the deed from Picquet to Jaques did not convey the legal title at all, as I have held elsewhere in this opinion, then it continued uninterruptedly in Dumas. In either case, therefore, it is now in Josiah Randall as successor of John Peter Dumas. Now where the vendor of land retains the title, as a security for the purchase money, his lien upon the land being a partly equitable one, cannot be

affected by any lapse of time short of the period sufficient to raise the presumption of payment, whatever might be the operation of the statute of limitations in an action at law brought to recover the purchase money: and even the assignee of a promissory note given for the purchase money of land, (the legal title being retained by the vendor, may bring his bill after the lapse of five years, convening the vendor and vendee, and compel specific execution of the contract, in a case proper for such relief, and subject the land to the satisfaction of his claim. *Hanna v. Wilson*, 3 Grat. 243. Recovery in the case at bar, therefore, which is identical with the case last cited, cannot be defeated by the operation of the statute of limitations, whether the objection arises on demurrer or by plea.

Again it was said that there was no valid mortgage here to be foreclosed; that there was no *debt* arising here out of these contracts, and that *debt* was of the essence of a mortgage; that the demand of the complainant sounded in damages merely, and that his proper resort was to a court of law to have them assessed. This objection is formed, I apprehend, in a misconception of the true nature of the contract here, which departs from the usual form of money contracts. The vendee stipulates to pay not in money, simply and generally, but a given amount of money, viz: \$12,000, in *cattle and horses*. Now where a sum of money is reserved, payable in an *indefinite* quantity of a collateral article, it is substantially a money demand, for the debtor is bound by his contract to furnish so much of the collateral article, as at the day of delivery will bring, in the market, the specified sum. If there be a breach of the contract, by a failure to deliver, the creditor may bring an action of *debt* for the amount of money specified, without averring the non-delivery, of the collateral article. By the form of the contract the debtor has acquired the privilege of paying off his debt in a more convenient medium than money, and having waived his privilege, the creditor may treat the claim as if no such privilege had been retained by the debtor; in other words, may recover the sum of money specified in an ordinary action of debt. But if a specified sum of money is stipulated to be paid in a *definite* quantity of a collateral article of fluctuating value, then it is clear that no *debt*, in a legal sense, results, but in case of a breach by the failure to deliver, a jury must be impaneled to enquire of damages, which cannot be ascertained except by a resort to extrinsic evidence. Thus, if a farmer gives his bond or note for the payment of \$1,000, by a given day, in one thousand bushels of wheat, and there is a breach, the loss of the creditor is not necessarily \$1,000, but more or less, according to the market price of the wheat on the day of the breach, and at the place of de-

livery. Here, debt will not lie, but assumpsit or covenant only, according to the nature of the contract, the former, if a parol, the latter if it be a sealed contract. These distinctions are very well established by the Court of Appeals of Virginia, in the cases of *Beirne v. Dunlap*, 8 Leigh 514, and *Butcher v. Carlile*, 12 Grat. 520. The contract here is referable to the first of these classes of cases, and an action of debt would lie upon it.

The last objection as arising on the demurrer, is that the proper parties are not before the Court. The French creditors of Swan have not been convened, and as they are the *cestui que trusts* of the complainant, and no special reason appears why they should not be made parties, I think the objection is well taken.

Demurrer sustained, and leave given to the complainant to amend his bill, and make new parties.

FRAUDULENT CONVEYANCE. DEED.

In the District Court of the United States for Wisconsin, 1859. In Equity.

Newcomb Cleveland vs. The La Crosse and Milwaukee Railroad Company, Selah Chamberlain, Moses Kneeland and others.

1. A deed of land by the corporation to two of its directors is void as against creditors of the corporation.
2. A lease of a railroad and rolling stock, with the power in the lessee to run the road and to purchase additional rolling stock at his discretion, and to extend the road out of the proceeds or revenue, the lease being for an indefinite term of time, is void as against creditors of an insolvent company, for hindering or delaying them in the collection of their debts.

The opinion of the court was delivered by

MILLER, J.—The complainant recovered a judgment in this court for \$112,271 against this company, on the 7th October, 1857. On the 22d of the same month he issued a writ of *fi. fa.* on the judgment; under which was levied the rail road of the company, and all the franchises, rights and privileges thereunto belonging and appertaining, including roads, roadways, rights of way, and real estate of every description, station houses, buildings, and the grounds and lots, cars, locomotive engines, &c. And also the Milwaukee and Watertown Division. And also several lots in the city of Milwaukee, describing them.

The company, having the lots for sale, accepted a proposition of purchase from C. D. Nash, a person not connected with the

company; and for the consideration of twenty-five thousand dollars, part in farm mortgage bonds and part in stock of the company, the lots were conveyed to him. This sale was brought about, and the consideration was furnished by Moses Kneeland, a member of the board of directors; who afterwards received the title from Nash, and conveyed an undivided interest to James Ludington, another member of the board. There was a large amount of testimony respecting the value of the lots; some witnesses valuing them about the amount of the consideration of the conveyance, some less than that amount, and some very much higher. There was proof of large expenditures by Kneeland and Ludington in dredging the river, building docks, and in other permanent improvements. At the time of this sale the complainant was a creditor of the company, as a contractor for building a portion of the road. The bill prays a decree that the lots be subject to the judgment and execution, and to a sale in satisfaction of the judgment, and that Kneeland and Ludington shall convey them to the purchaser under the execution.

Directors of an incorporated company are trustees of the corporators; and have possession of the corporate property for the corporators and the creditors of the company. All property of a corporation not sold in good faith, is liable to its creditors for the payment of its debts. 2 Story's Ev. § 1,252; *Curren vs. The State Bank of Arkansas*, 15 Howard, 304. *Mumma vs. The Potomac Company*, 8 Peters, 281-286. It is well settled that trustees cannot purchase the trust estate. They are the vendors dealing for the interest of the corporation in making sale; the representatives of the company. Such persons cannot be permitted to purchase, where they have a duty to perform inconsistent with the character of purchasers. Deeds made between persons who are not standing in the relation of vendors and purchasers, whether directly or indirectly, are voidable, even upon a fair consideration paid. *Michaud vs. Girod*, 4 Howard, 503; *Hawley vs. Cramer*, 4 Cowan; *Tany vs. The Bank of Orleans*, 9 Paige, 647; 7 Hill, 260; Grant on Corporations, 159 and notes. And the use of a go-between in an evidence of fraud. Such deeds convey a title good against all persons but the *cestui que trust*, and as to him they are void; but he may confirm them by receipt of the purchase money, or by release, with full knowledge of the facts. The company made no objection to the sale after it became known that the purchase was made for Kneeland and Ludington; but by a resolution, the board confirmed those deeds, since this bill was filed. The question is, whether this plaintiff, as a creditor of the company, can by this bill and proceeding obtain a decree affecting these deeds.

If those deeds had not been made, it is clear that the lots would be subject to levy and sale as the property of the company, under the plaintiff's execution. And if the lots are now in equity the property of the company, they are subject to sale in satisfaction of the judgment, according to the law of the state. The company might have obtained a decree vacating those deeds, and then have turned out the lots, discharged of the apparent clouds upon the title, for sale under this execution. This the company should have done, after it became known that two of the directors were the purchasers.

A creditor of an insolvent corporation cannot sustain a suit at law against the directors thereof for negligence in the management of its affairs, whereby its property has been wasted, and its means of paying the plaintiff destroyed. *Clark vs. Lawrence*, 21 Law Reporter, 392. But a stockholder in a corporation has a remedy in chancery against the directors, to prevent a misapplication of their capital or profits, which might lessen the value of the shares if the act intended to be done amount to a breach of trust or duty. *Dodge vs. Woolsey*, 18 Howard, 331. Then why should not this judgment creditor sustain this bill against the company and directors of the company, to have applied to his debt property which was conveyed by the company to those directors by either voidable or fraudulent deeds, after the company has refused to discharge its duty as an honest debtor? It is a grave question whether these deeds should not, under the circumstances, be considered voluntary conveyances in fraud of creditors.

It is said, in the opinion in the case of *Curren vs. The State of Arkansas*, 15 Howard, on page 397—"The plaintiff is a creditor of an insolvent banking corporation. The assets of such a corporation are a fund for the payment of its debts. If they have been distributed among stockholders, or gone into the hands of others than *bona fide* creditors or purchasers, leaving debts of the corporation unpaid, such holders take the property charged with the trust in favor of creditors, which a court of equity will enforce, and compel the application of the property to the satisfaction of their debts." In that case the State of Arkansas, as a stockholder, by acts of the legislature, invested itself with assets of the corporation. See 2 Story's Eq. § 1,252; *Mumma vs. The Potomac Company*, 8 Peters, 281; *Wood vs. Plummer*, 3 Mason, 308; *Wright vs. Petrie*, 1 Smedes & Marshall, 319; *Nevitt vs. The Bank*, 6 Id., 213; *Hightower vs. Thornton*, 8 Georgia, 493; *Nathan vs. Whillbeck*, 3 Ed., Ch. 215, 9 Paige, 152; *Wood vs. Grant*, 15 Mass. Rep., 505; *Speer vs. Grant*, 16 Mass., 9; *Carson vs. African Co.* 1 Vt., 121. But if there should be any doubt of the right of the

plaintiff to bring this bill, the law of the state entirely removes it. The statute provides, that the circuit courts of the state shall have jurisdiction over directors, managers, trustees, and other officers of corporations, to compel them to account for their official conduct in the management and disposition of the funds and property committed to their charge; to order and compel payment by them to the corporation whom they represent, and to its creditors, of all sums of money, and of the value of all property which they may have acquired to themselves; to set aside all alienations of property made by trustees or other officers of the corporation, contrary to the provisions of law, in cases where the persons receiving such alienations knew the purposes for which the same were made. And the jurisdiction thus conferred may be exercised as in ordinary cases on complaint or petition of a creditor of the corporation. The statute is sufficiently comprehensive to cover the case made by this bill. It is contended on behalf of the defendants, that that law cannot be enforced by this court; but in this I think the counsel are mistaken. The statute laws of the state do not confer jurisdiction on the federal courts, but those courts extend to their suitors the remedies provided by those laws of the states wherein they are located, according to their own rules of practice. *Exparte Biddle*, 2 Mason, 472.

It is contended on behalf of the defendants, that if the lots should be adjudged bound by plaintiff's judgment and execution; the consideration of the purchase, and their disbursements for taxes and improvements should be recognized as a paramount lien in equity. With the consideration paid this plaintiff has nothing to do. He is not such a *cestui que trust* as an heir, legatee or ward, who has received a part of the consideration to be accounted for; as in the case of *Michaud vs. Girod*, 4 Howard, 503. What they or the company did with the consideration is not a matter for inquiry. The consideration was of rather an unusual nature, to pass between a corporation and its directors. The company and these directors will have to settle that matter between themselves. If the consideration had been paid in cash, and proven to have been appropriated to the payment of legitimate debts of the company, it might possibly be considered a paramount lien; but I do not consider that these defendants have any such claim. It is the duty of the court to place these parties, as nearly as may be, in such position that, by doing justice to one, injustice may not be done the other. For this reason the court will order a reference to a master, to ascertain the annual rents and income of the property, with interest; and also to ascertain the amounts paid by these defendants for taxes, and for the extinguishment of liens and the ac-

tual cost of permanent improvements made by them, with interest. The master may take additional testimony to that on file, and he may examine these defendants on oath touching the matter submitted to him. Upon the confirmation of the report, a decree will be made, so that the proceeds of the sale of the lots may be equitably appropriated to these parties.

This is technically a bill in aid of an execution levied; but under the prayer for general relief, the court may decree the deeds to be void, and may appoint a receiver to make sale of the property. The lien of the judgment was sufficient for this purpose, without the service of an execution. 1 Paige, 305; 4 Johns. Ch., 677; *Clarkson vs. De Peyster*, 3 Paige, 320; *Cha-tauque Bank vs. White*, 2 Selden, 236.

The company and Chamberlain made a contract on the 20th November, 1856, for ballasting a portion of the road from Beaver Dam to Portage city, at forty cents per yard, the company to find the motive power. On the 20th January, 1857, they made another contract for the construction of the road bed on the western division, extending from Portage city to La Crosse, about one hundred and ten miles of main line and side track, at \$12,000 per mile; extra work specified, to be paid in addition and ten per cent. to be retained from estimates; to be paid on the completion of each thirty-four miles. It was also agreed, that at any time during the progress of the work, the company shall have the right to suspend the performance of the work, as it may deem expedient, and again to require it to be resumed, without being held liable for damages for such suspension; provided, that at least thirty days notice of such suspension be given, and a reasonable extension of time for the completion of the whole work, be allowed. And on the same day the parties made a further agreement, whereby the company extended the time for completing the work contracted for, and released Chamberlain of any claim of damages for not completing the work at the times specified. On the 30th of April, 1857, the company and Chamberlain entered into a contract for tunneling the dividing ridge, instead of a through cut, at prices largely exceeding the price specified in the original contract. On the 20th of September, 1857, the company and Chamberlain made two agreements in writing, under seal. In one, the parties agree that the contract for the construction of the western division, from Portage city to La Crosse, of January 20th, 1857, and the supplemental contract of April 30th 1857, be so modified, that Chamberlain shall proceed to complete the construction of the road as far as the depot at New Lisbon, with reasonable dispatch, and by the first of December following. The time for completing the road from New Lisbon to La Crosse is extended indefinitely,

and the road to be constructed between these last points as fast, and no faster, than the company shall be prepared and ready to pay in cash, on monthly estimates. The contract of November 20th, 1856, is also modified. And "in consideration of the extension of the time of constructing the road from New Lisbon to La Crosse; and the damages which Chamberlain will sustain by reason of such extension; and by loss on teams, materials, tools, machinery, and in other ways; and also in consideration of the mode of payment of the amount now due, and the amount to become due to him for finishing the road to New Lisbon; and in consideration of the failures and delays of the company in making payment theretofore due; and in further consideration of the services, risks, and personal expenses of Chamberlain in the operation and management of the road, according to a contract and lease; the company agrees to pay him two hundred thousand dollars!" It is further agreed, "that before the 20th October following, a full and correct statement shall be made of the amount due to Chamberlain on the date of the agreement under the previous contract, which, together with the said sum of \$200,000, shall be the balance due him on the 1st day of October, 1857, from the company. And on the first day of every month thereafter, Chamberlain shall charge the company with the amount that shall be due under or by virtue of the said contracts, or this contract, for constructing the road between Portage city and New Lisbon; and he shall credit the Company with such sums as he shall receive from the net earnings of the road, by virtue of the contract of lease of this date. And on the first days of July and January in each year thereafter, a semi-annual statement of the accounts between the parties shall be made out, in which interest shall be added to the day of making such statement, at the rate of *twelve per cent. per annum*. Whatever sums of money shall hereafter become due Chamberlain for work in the construction of the road between New Lisbon and La Crosse, shall be paid by the company from means derived from other sources than the income of the rail road."

By the other contract of the same date, the company "in consideration of the undertakings and agreements of Chamberlain, sells and conveys to him all its personal property of every name, kind and description, in the State of Wisconsin, (except all such as is used on, and is appurtenant to the operation of the Watertown Division of the La Crosse and Milwaukee rail road,) of which an inventory shall be taken and attached so soon as the same can be conveniently done." "And the company, in consideration of the said undertakings and agreements of Chamberlain, leases and lets to him from and after the thirtieth day of September, 1857, for an indefinite term of time, to be

determined in the manner specified, its entire rail road and rail road route from the city of Milwaukee, by way of Horicon and Portage City, to the city of La Crosse, together with its right of way, depot grounds, and all buildings, tenements and fixtures of whatever kind or description, connected therewith, or appurtenant thereto, together with all estate, rights, privileges, appurtenances and franchises connected therewith, or belonging or incident thereto, subject only to such prior or superior liens, as may or do exist thereon. Chamberlain shall operate so much of the road, as is ready for operation, and from time to time such portions as shall be made ready for operation, in such manner as will produce the largest amount of net receipts. He shall keep the road and rolling stock in good thorough repair; and he shall receive and appropriate all the receipts of income derived from the operations of the road. If it shall be found for the interest of the company, he may purchase additional rolling stock, and appropriate the receipts of the road for its payment." It is then agreed that monthly accounts shall be rendered by Chamberlain, and that the officers of the company shall at any time have the right to examine his accounts. Then follows a statement of coupons of prior mortgages on the road, that are to be the first paid out of the net receipts of the road, and of the amount to be appropriated to the sinking fund; and the residue of the net receipts shall be applied by Chamberlain in payment of the amount due or hereafter to become due to him, by virtue of the contracts, as specified in the agreement of this date, and also of this said agreement. And Chamberlain agrees that whenever he shall have received from the earnings of the road such sum as by the terms and conditions of the several contracts, (describing them,) he is, or shall be entitled to receive; or whenever the company shall pay him any balance he shall be entitled to, that he will surrender up to the company the quiet and peaceable possession of the whole premises in good repair, and all rolling stock and other personal property put on said road by him, and all personal property that shall not be worn out; and then the contract shall cease and determine.

The bill prays that these contracts may be annulled as fraudulent; and that Chamberlain may be enjoined from further controlling or running the road, and for general relief.

The answer of the company alleges that the contracts or agreements were made with the sole view and design, on its part, of vesting in Chamberlain the right of possession, enjoyment and use of all and singular the property, rights, privileges, franchises and emoluments therein mentioned, upon the terms therein expressed, for the purpose of securing the payment to Chamberlain of the several debts due and owing him by the compa-

ny, and as a security and as a means of payment of a large sum of indebtedness then due and owing him. And it denies that the contract was made with a fraudulent intent. The answer of Chamberlain is very nearly a duplicate of that of the company, in this respect.

On the 2d day of October, 1857, and during the trial of the plaintiff's suit at law against this company, the company confessed a judgment to Chamberlain, in this court, for six hundred and twenty-nine thousand and eighty-nine dollars. It is alleged in the bill, that the company did not then owe him exceeding fifty thousand dollars; and that the judgment was confessed to hinder or delay creditors, and is fraudulent. The bill prays that the judgment be vacated.

Mr. Kilbourn, the president of the company, testified that he was present, and acted in the board when the judgment was confessed, and when the lease was given. Chamberlain was anxious for security for his debts; he thought he was incurring too large responsibilities on uncertainties. The company gave him assurances of security, as the great point with the company was the completion of the road. As September and October approached, the company was getting deeper into embarrassments. An association of bond holders was threatening the company, and he saw but one way to save the road and secure its ultimate completion, which was to make the lease to Chamberlain. The board came to the same conclusion; and the lease was made. The only remaining hope for the continuance of the work on the road, seemed to be, to give Chamberlain such a lien on it as would assure the payment of what had already become due for the work then done, as well as for that to be done under the contract. This was the great and paramount danger which threatened to overwhelm the company; but there were other and nearer dangers threatening the company more immediately, against which it was equally necessary to guard. One or two attachments had been issued against the company, for a few hundred dollars, and it seemed quite evident that by such means the company's resources would soon be so exhausted as to render it entirely powerless for further progress. The floating debt of the company then amounted to \$300,000 in small sums, which, if sued under the panic, would have effectually arrested the progress of the work, and prevented the completion of the road. At the time of giving the lease, the amount of indebtedness to Chamberlain was not known. It was the intention of the company to give him a perfect lien on the road and its earnings; to secure all indebtedness accrued and accruing under his contract, until the whole amount should be paid; and such was one of the conditions of the lease, without reference to the specific amount.

The amount of indebtedness at that time, or any other time, was not a necessary element of the lease. The reason why the judgment was ordered by the board, he understood to be, in consequence of a doubt entertained by the counsel of Chamberlain, whether more legal difficulties might not be raised, as to his lease lien covering the iron not laid down on the road; and to avoid all questions in that respect, and in part to render the transaction so regarded a lien, as perfect as possible; and to accomplish the ends proposed to be secured by it, it was deemed advisable by the board, under advice of counsel, to give the force of a judgment in support of the previous lien, for the amounts then reported to be due by the chief engineer, whose statement was considered conclusive by the company. Cleveland's suit was then pending. It was rather a hurrying time with the company. Other matters were pressing. Chamberlain first suggested the judgment. It had particular reference to the iron which Vose, Livingston & Co. were endeavoring to reclaim. He wanted, first, to secure the completion of the road; second, to secure the Wisconsin stockholders. In order to secure these objects, he deemed it necessary to give the lease and judgment before Cleveland got his judgment; and he explained his views to the board. The iron was to be devoted to the use of the road, and Chamberlain was to have the use of the road to secure him. The agreement was understood to be, that the iron was to be laid on the road. So far as any thing was said by Chamberlain, it was evident that his motive was to secure payment of the debts due and accruing to him from the company. The judgment was for a specific amount then due, as reported by the chief engineer. The leading object of the directors was the completion of the road. The judgment was not in derogation of the lease, but to carry out its objects. There was no understanding, when Chamberlain proposed that the judgment should be given, that it should be used in any way inconsistent with the completion of the road. Probably Chamberlain's object in proposing the judgment was not only to protect himself against Vose, Livingston & Co., but also against Cleveland's claim.

In our conversations with Chamberlain the principal matter talked of was his security. It was understood that he should go on with the work. The allowance of \$200,000 to Chamberlain was not included in the judgment.

A great amount of testimony was submitted on this subject, and on the amount of indebtedness of the company to Chamberlain, which is not necessary to be here stated.

The company is authorized by its charter "to make such covenants, contracts and agreements, as the execution and management of the work, and the convenience and interests of the com-

pany may require." And it is "empowered to borrow money at any rate of interest, and to make all necessary writings, notes, bonds, mortgages, or other papers and securities, in amount and kind as may be deemed expedient, or in discharge of any liabilities that it may incur in the construction, repair, equipment or running of said road." The lease to Chamberlain was intended as a security, in the kind or nature deemed expedient for liabilities incurred, and to be incurred, in the construction, repair, equipment and running of the road. The company, by virtue of the general powers vested in it as a corporation, has all the powers contained in this provision of the charter. It does not materially enlarge the general power of the grant to contract and be contracted with. It was not intended to embrace a contract for a transfer, or lease of all the franchises of the company for an unlimited term; The powers and privileges granted to the company are in many respects unusual and extraordinary; but unless so expressed, public policy and the rights of creditors should exclude any such construction of the charter as to sanction this lease.

The law of the State empowers rail road companies to borrow money and to execute trust deeds, or mortgages, or both, on rail roads constructed, or in process of construction, for the sums borrowed or owing, upon such terms and in such manner as the company shall deem expedient; and the company may make such provisions in the trust deed or mortgage for pledging or transferring their rail road track, right of way, depot grounds, rights, privileges, immunities, machine house, rolling stock, furniture, tools, implements, appendages and appurtenances belonging to or used in connection with such rail road, in any manner whatever, as security for any bonds, debts or sums of money that may be secured by such trust deed or mortgage. And in case of the sale on such mortgages or trust deeds, the purchasers shall acquire and shall exercise and enjoy all and the same rights, privileges, grants, franchises, immunities and advantages in the mortgage, or trust deed enumerated and conveyed, as fully as the corporation, shareholders, officers and agents of the company might or could have done. And the purchasers may proceed to organize anew and elect directors, distribute and dispose of stock, take the same or another name, and may conduct their business generally under and in the manner provided in the charter, with such variations in manner and form of organization as their altered circumstances and better organization may seem to require; but no greater or enlarged powers shall be exercised by the new organization. These laws establish the policy of the State in regard to the power of rail road companies to mortgage their roads; and they relieve the court of all em-

barrassment on that subject. By the laws of this State, railroad companies and individuals are placed on an equality in respect to their mortgages.

The two agreements of the 26th September 1857, must be considered as one. They are so intimately connected, that they might have been embraced in one agreement.

It is contended that the defeasance gives the agreement the character of a mortgage; but without it the company would have the equitable right to regain possession by discharging its liabilities to Chamberlain. *Nugent vs. Riley*, 1 Metc. 117; *Erskine vs. Townsend*, 2 Mass. 493; *Hughes vs. Edwards*, 9 Wheaton, 489; 1 White & Tudor's Cases, 510; Hilliard on Mort. 22; *Conway vs. Alexander*, 7 Cranch, 218; *Morris vs. Nixon*, 1 Howard, 118; *Russell vs. Southerd*, 12 Id. 139; *Sprigg vs. The Bank*, 14 Peters, 201, *Conrad vs. The At. Ins. Co.* 1 Peters, 386; Redfield on Railroads, 584, 585, and cases cited.

A court of equity will look to the substantial object of the conveyance, and will consider an absolute deed a mortgage whenever it is shown to have been intended merely as a security for the payment of a debt; and the grantee may maintain a bill to foreclose the equity of the grantor. But Chamberlain could not proceed in equity to foreclose on this agreement, if he had not been placed in possession. I apprehend his remedy would then have been at law upon the contract. It was not given nor received as a security for money borrowed; but as a security for a debt accruing and to accrue, with a transfer of possession of the premises. If possession had not been delivered to Chamberlain, I know of no means he had for enforcing a foreclosure, or of acquiring possession. But being placed in possession he may be proceeded against by a bill at the suit of the company to redeem, and for an account.

Technically this agreement is not a mortgage. It is an assignment to a preferred creditor, with a lease for the mutual interest of the parties. If this were a mere assignment of a part of the property of the company, it might, if *bona fide*, be adjudged as a mortgage of the property transferred, so that the residuary interest of the grantor may be reached by execution, or by a bill in equity, as in *Leitch vs. Hollister*, 4 Comstock, 211. A debtor has a right to prefer one creditor to another in payment; and his private motives for giving the preference cannot effect the exercise of the right, if the preferred creditor has done nothing improper to procure it; but any unlawful consideration moving from the preferred creditor, to induce the preference, will avoid the deed which gives it. *Marbery vs. Brooks*, 7 Wheaton, 556. And it is no objection to such an assignment,

that it defeats other creditors of their legal remedies. *Brooks vs. Marbery*, 11 Wheaton, 223. A debtor may lawfully apply his property to the payment of the debts of such creditors as he may choose to prefer; and he may select the time for doing it, so as to make it effectual. Such preference must necessarily operate to the prejudice of creditors not provided for, and cannot furnish any evidence of fraudulent intention. And such assignments may be made direct to the creditor. *Tompkins vs. Hughes*, 10 Peters, 106. It is not a legal objection to this agreement as an assignment, that it was made during the trial of the plaintiff's cause against the company, and before judgment was rendered. So long as a person or corporation is the owner of property, unincumbered, an assignment may be made for the payment of debts, giving preferences where there is no statute law prohibiting it, as in this State. But where fraud is alleged, the time, the occasion, and the inducement for making the assignment are proper subjects for consideration.

Under the pecuniary embarrassments of the company, the assignment was made to Chamberlain, as a security for a debt partly accrued and partly to accrue, in building the road to New Lisbon. The whole road from Milwaukee to La Crosse is embraced in the lease, while a great portion of it was not then completed. There is no doubt, from the testimony of the witnesses, and from the face of the agreement, that the intent of the parties was to prevent the creditors of the company from further interfering with, or interrupting its operations. Chamberlain obtained a preference over other creditors, for a debt then existing; and he acquired possession of the whole property of the company, with which to carry on the business of the company. And while increasing the amount of his debt against the company, he enjoys the exclusive possession and control of its property for an indefinite period of time; subject to the duty of rendering an account semi-annually, showing his balance against the company, on which he draws interest at the rate of twelve per cent. per annum. In operating the road and in supplying rolling stock, at his discretion, he is substituted for the directory of the company. For an indefinite period of time he is the company for all practical purposes.

Assignments of insolvent debtors, giving unlimited discretion to the assignee, cannot be sustained against creditors.

Assignments must be absolute and specific in their directions; and not coupled with trusts not authorized by law. 7 Paige, 568; *Boardman vs. Holliday*, 10 Id. 223. Nor can such an assignment be used as a device to continue the business of the assignor uninterrupted by his creditors. *Ewen vs. Brady*, 5 Ad. & Ellis, 28, *Am. Ex. Bank vs. Julees*, 7 Md. 380. And a

debtor cannot make a reservation at the expense of his creditors, of any part of his income or property, for his own benefit ; nor can he stipulate for any advantage to himself. *Green vs. Trieber*, 3 Kd. 11. Assignment must be made in good faith, for the purpose of paying debts, and without any intent to lock up the property from other creditors for the use of the debtor. A conveyance of the owner in trust for himself, is in effect a conveyance to himself ; and the grantor in such deed can have but one motive, and that must be to hinder or delay the claims of creditors. The law does not tolerate any hindrance in assignments for the benefit of creditors, beyond what may be necessary for the purposes of the assignment. And any stipulation in a deed, which materially hinders or delays the rights of creditors, renders it void. A deed of assignment authorizing the assignee to sell the assigned property on credit, is void as to creditors, on account of the delay. *Henderson vs. Griffin*, 2 Comstock, 365. A transfer of property, which creates a trust, whether secret or avowed, in favor of the grantor, renders the transaction fraudulent and void in legal contemplation, even though there may be mingled with it provisions in favor of preferred creditors. *Shaffer vs. Watkins*, 7 Sergt. & Rawle, 219. In the case under consideration the time for executing the assignment is unlimited ; to be terminated only by the payment of the assignee's accrued and accruing debt by the insolvent company, or out of the avails and proceeds of the property and business of the company. The whole profits, beneficial interest, enjoyment and control of the road and property of the company passed to this preferred creditor, with powers to manage and run the road, and to purchase additional stock at his discretion. The direct tendency, as well as the avowed paramount object, was to carry on the business of the company, and to pay the assignee and preferred creditor out of the profits. The cases of *Arthur vs. The Commercial Bank of Vicksburg*, 9 Smedes & Marshall, 394, and *Bradley vs. Goodrich*, 7 Howard, 276, are irresistible authorities for determining this case against the defendant Chamberlain. The Commercial and Railroad Bank of Vicksburg assigned all its property to trustees, reciting that "The embarrassed situation of the bank and the present inability of its debtors to meet their liabilities, and by consequence, that the bank was unable to pay its debts promptly, rendered it necessary that a general assignment should be made for the benefit of its creditors and the completion of the railroad ;" it therefore assigned all its property to trustees, with authority to sell the effects assigned, to collect all debts due to the institution, and to complete the railroad ; for which they were authorized to borrow a sum not exceeding \$250,000 ; and out of the proceeds collect-

ed, to pay the principal and interest of the loan. After that, dividends were to be made *pro rata* among the creditors. The trustees to receive eight thousand dollars each per annum for their services. The Supreme Court of the United States decided "that the deed was fraudulent and void as against creditors of the bank. That the deed showed on its face an intention of the bank to postpone its creditors, use the effects of the bank for the completion of the railroad, pay the trustees enormous salaries, and make no dividends among the creditors until the object was accomplished." The deed in that case made some show of regard for the rights of creditors, but the deed in this case only contemplates a benefit to the parties, the insolvent assignor, and the preferred assignee. How much salary was allowed Chamberlain in the \$200,000 is not specified, but from the recklessness exhibited on the part of the directors, it may be presumed to be enormous. The whole recital of items comprising that amount, strikes me as extraordinary and enormous, after Chamberlain's original contract price for building the road had been extravagantly enhanced, and while he had in his hands funds of the company amounting to nearly \$150,000, which the directors did not require to be accounted for or applied. And it is questionable whether under the circumstances, Chamberlain was entitled to any damages for the temporary suspension of the work west of New Berlin.

The principles here stated apply to assignments direct to a preferred creditor, as well as to those in trust for creditors. *McChurg vs. Lackey*, 3 Penn. Rep. 83; *Passmore vs. Eldridge*, 12 Sergt. & Rawle, 198.

The assignment and lease to Chamberlain will be decreed to be void as against this complainant.

The defendant Chamberlain in his answer denies that the judgment confessed by the company in his favor was based on any fictitious consideration, or was given and accepted with any intent or design to hinder or delay, or defraud the creditors of the company; but on the contrary, he says that it was given for effectual indebtedness from the company to him. And he claims that the amount of work done for the company under his contracts exceeds the amount of the judgment. In the testimony of the witnesses there is very great discrepancy as to the amount of work done, and also as to the prices that should be paid. One thing, however, is beyond dispute; that the amount included in the judgment far exceeds the amount he would be entitled to on his original contract. The company might increase his compensation within reasonable bounds, without incurring the imputation of fraud. In pursuance of the agreement between Chamberlain and the company in the month of December 1857,

for re-measuring the work, for the purpose of ascertaining the amount due him on the 1st of October, 1857, a survey and estimate were made, which showed an amount greater than that of the judgment. If that survey and estimate had been made on notice to the complainant, more reliance could be placed on the evidence upon that subject. Neither that survey nor the one for the complainant can be accurate, on account of the length of time the work had been done. Chamberlain may not be entitled to anything near the amount of the judgment. But liberality on the part of the company should not be considered fraudulent, unless it be so excessive as to bring the mind to that conclusion, after an examination into all the circumstances. This is not a suit of Chamberlain against the company on the contracts, requiring a legal enquiry into the amount due him; but the only question for our consideration is whether the judgment is fraudulent as against creditors. The judgment was confessed a few days after the assignment, while the company was laboring under its pecuniary embarrassments. The testimony of Mr. Kilbourn is, "that the judgment was suggested by Chamberlain and his counsel. That it had particular reference to the iron Vose, Livingston & Co. were endeavoring to reclaim. The completion of the road first, and securing Chamberlain, were the objects of the company, and they deem it necessary to give the lease and the judgment before Cleveland should get a judgment. The judgment was not in derogation of the lease, but to carry out the object of the lease. Probably Chamberlain's object in proposing the judgment was not only to protect himself against Vose, Livingston & Co., but also against Cleveland's claim."

The confession of a judgment to a bona fide creditor, even though it have the effect of giving him a preference over other creditors, is not a fraudulent disposition of an insolvent estate. While there is no statute prohibiting it, an insolvent debtor has a right to give preference to his creditors by confessing judgments. But if such judgments are given and received for the purpose of hindering or delaying creditors, they are voidable as against those creditors, if even for a bona fide debt, and if not used for that purpose. When a judgment is given and received for a fraudulent purpose, the giving the judgment is such an act done in pursuance of the fraudulent purpose, as to render it voidable by any person who is in a position as a creditor, to question it. And such a judgment, originally given for the purpose of defrauding creditors, cannot even be used as against such creditors, to collect the amount due to the party to whom it was given. *Bunn vs. Ahl*, 5 Casey, 387. If Chamberlain had merely demanded and received the judgment, even to the known delay of Cleveland and the other pressing creditors of the com-

pany, it would not be legally invalid as against them. But would the judgment have been demanded and given, after the assignment and lease, but for the purpose of forestalling Vose, Livingston & Co., in reclaiming the iron, which the interests of Chamberlain and the company required should be laid on the track of the road; or to further the paramount object of the assignment and lease? The suits of Vose, Livingston & Co., respecting the iron, and the two contracts of settlement between them and Chamberlain and the company, show that they were pressing a claim for the iron, which was compromised by those contracts. So far it appears that Vose, Livingston & Co. had a claim, to effect which the judgment was demanded. But be this as it may, it appears satisfactorily that the judgment was given and received as part of the arrangements to secure the future operations of the company and Chamberlain, in the prosecution of the work towards completion, while the creditors of the company should be hindered or delayed for an indefinite time; and it must fall under the same condemnation as the assignment and lease.

The assignment and lease to D. C. Freeman, of the Milwaukee and Watertown Division, having expired by its own limitation, it is not necessary to make any decree against him, except that he pay his share of the costs.

The plaintiff is left now to pursue his legal remedies against the company on his execution.

We are indebted to the American Law Register, July 1859, for the foregoing case.

THE TESTIMONY OF MEDICAL EXPERTS, AND THE READING OF MEDICAL BOOKS IN JURY TRIALS.

The admissibility of the evidence of experts in courts of justice, has long been settled, but there is still some discrepancy as to the conditions of its admission, sufficiently important to deserve a most careful consideration.

Of late years, cases have become more and more frequent, in which such evidence has been admitted touching the mental condition of one of the parties; and the expert is even allowed to form his opinion, solely, perhaps, on the statements of other witnesses, without any personal examination of the party himself. Counsel, it is true, often endeavor to discredit such evidence, by calling it theoretical and speculative, but if they re-

ally believe what they say, they only show a great misapprehension of the nature of the question. The mental condition of a person is manifested by his conduct and conversation, by his acts, his opinions, his manners and deportment, all which are matter of observation, and may come within the cognizance of others besides that of the expert. Although a personal interview may sometimes reveal all that is required, yet, more frequently, from the very nature of the case, the expert obtains from it no satisfactory results. What a man may happen to say or do, in the course of a brief interview with a stranger, may be of little significance, as compared with his mental manifestations during a period of weeks or months, when following the bent of his inclinations without restraint, and with opportunities for carrying his diseased fancies into practical effect. There is nothing singular in this. Medical opinions in regard to other diseases than insanity are seldom founded exclusively on a personal examination of the patient. Facts of the highest importance are often learned from friends and nurses, and could have been learned perhaps only from them, but are none the less valuable on that account.

An opinion respecting the mental condition of a person whose sanity is in question, must be founded upon his previous history; at least, so much of it as may be supposed to throw any light upon his mental condition at some particular time. In a doubtful case, it would only indicate the height of ignorance and presumption to arrive at a positive conclusion on the strength of a single interview, or of any other very limited source of information. Indeed, we can hardly conceive of any case requiring investigation, plain enough to be settled in this manner. We know that patients are, every day, received into our hospitals for the insane, on the strongest representations of friends, yet, for days and weeks together, though subjected to the closest scrutiny, they may betray not the slightest indication of insanity. The power of self-control is exhausted, sooner or later, no doubt, and the disease is evinced by unmistakable evidence; but the fact shows conclusively, that the observation of a man's neighbors and acquaintances may furnish far more satisfactory proof of his insanity, than any single examination of the most accomplished expert. Of course, there is no other way of obtaining the object, in cases where the alleged insanity has disappeared, or the party has deceased.

It has also been objected to the testimony of experts on this subject, that in consequence of their intimate association with the insane, and their familiarity with the manifestations of the disordered mind, they overlook the sharp distinctions that really exist between the sane and the insane condition. Engrossed as

they are in their favorite study, they look at all men through a distorted medium, and thus see insanity where others of a different training, see only the normal operations of the mind. That such persons may often see insanity where it is unperceived by others, is just what might and ought to be expected of men of intelligence and discernment, with abundant opportunities for observation. It would be but a poor compliment to them, to say that after all, the delicate shades of mental disease, the faintest possible lines that divide sanity from insanity, those equivocal phases of mind which neither the philosopher nor the practical observer of men attempt to explain, are no more clearly discerned by them than by others.

The insanity which lies on the surface is obvious enough to all, but it is only the practised observer of the disease, who can detect it in its milder forms, or when controlled and concealed by the sounder operations of the mind. To him, a look, a gesture, a turn of thought, a mode of expression, scarcely discernible by others, may supply a hint that leads to the most satisfactory proofs. It is not common, we apprehend, to suppose that great attainments in a physical science unfit a man for giving reliable opinions on points connected with it; and it is not easy to see any exception to the general rule in regard to insanity, which, beyond all others, can be understood only by means of a long personal observation. It is no presumption to say that the man who has spent the best years of his life in daily intercourse with the insane, is thereby better qualified, other things being equal, to enlighten a court of justice on difficult questions of insanity, than men without such experience, though otherwise intelligent, and, perhaps, with remarkable knowledge of human nature. The proposition seems too clear for argument or illustration, and yet, in practice, no objection to the value of medical testimony on the subject of insanity, is more commonly or more effectually urged, than the one under consideration.

Whatever may be the value of his testimony, the competency of the medical expert as a witness, is unquestioned. The only point not quite settled, is how his opinions shall obtain. In the courts of this State, and of every other, so far as we can learn, the practice is for the expert, after hearing all the evidence in the case, to state the conclusions to which it has led him respecting the mental condition of the party in question.

In *Commonwealth v. Rogers*, 7 Metcalf, (1844.) the court said, "the proper question to be put to the professional witnesses is this; If the symptoms and indications testified to by other witnesses are proved, and if the jury are satisfied of the truth of them, whether, in their opinion, the party was insane," &c. "They are not," the court adds, "to judge of the credit of the

witnesses, or of the truth of the facts thus testified by others. It is for the jury to decide whether such facts are satisfactorily proved."

For the first time in this country, a different rule was adopted by the federal court of this circuit, in *U. S. v. McGlue*, 1 Curtis, (1851.) The medical experts "were not allowed," says the court, Mr. Justice Curtis presiding, "to give their opinions on the case. It is not the province of the expert to draw inferences of fact from the evidence, but simply to declare his opinion on a known or hypothetical state of facts; and therefore, the counsel on each side have put to the physicians such states of fact as they deem warranted by the evidence, and have taken their opinions thereon. If you consider any of these states of fact put to the physicians are proved, then the opinions thereon are admissible evidence to be weighed by you. Otherwise, their opinions are not applicable to this case." No authorities are cited for this departure from the universal practice of the country, but they may all be found in an article on Leading Criminal Cases, published in this Journal* for April, 1855. What ground they afford for this mode of obtaining the opinions of experts in questions of insanity, will be made sufficiently obvious by referring to a few of the principal cases.

At the trial of Earl Ferrers, in 1760, his counsel proposed to ask the medical witness, "whether any and which of the circumstances which have been proved by the witnesses, are symptoms of lunacy." Whereupon, the question being objected to by the Attorney General, Lord Hardwicke, who presided as Lord High Steward, observed that it "tended to ask the doctor's opinion upon the result of the evidence," and that he "must be asked whether this or that fact is a symptom of lunacy." 19 *Howell's State Trials*, 943.† More recently in *Regina v. Francis*, 4 Cox, C. C. 57, (1849,) a physician who had heard all the evidence, was asked whether from all he had thus heard, he was of opinion that the prisoner, at the time he did the act in question, was of unsound mind. The court, Baron Alderson, interposed, saying, "I cannot allow such a question to be put;" and on being reminded that the question was so put in *McNaughton's* case, he added, "I am quite sure that decision was wrong. The proper mode is, to ask what are symptoms of insanity, or to take particular facts, and assuming them to be true, to ask whether they indicate insanity on the part of the prisoner. To take the

* Boston Law Reporter.

† This ruling of Lord Hardwicke which we have given in full, precisely as reported, is wonderfully amplified and embellished in Lord Brougham's version of it, contained in his remarks in the House of Lords on the *McNaughton* case. See 67 *Hansard*, 614.

course suggested is really to substitute the witness for the jury, and allow him to decide upon the whole case." Shortly after, in *Doe d. Bainbrigg v. Bainbrigg*, 4 Cox, C. C. 451, (1850,) Lord Campbell ruled out the same question, and for the same reason. In *McNaughton's case*, Report of the Trial of Daniel McNaughton, by Bousfield & Merrett, 73, (1843,) the question was put to an expert who had heard the whole trial, "judging from the evidence which you have heard, what is your opinion as to the prisoner's state of mind?" and no objection was made. The Judges, in their replies to the questions proposed by the House of Lords in consequence of this trial, say, however, that although "where the facts are admitted, or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the questions to be put in that general form, yet the same cannot be insisted on as a matter of right."

Such are the principal decisions which furnish the authority in the case of *U. S. v. McGlue*, for departing from the American practice on this subject. It will be observed that in these cases, the question to the expert, disallowed by the court, was not exactly in the terms of that allowed in the *Rogers case*, as quoted above. In the former, the opinion is given under the single condition that the expert has heard all the evidence, so that in fact, he passes upon the evidence precisely like the jury. In the latter, there is another condition,—he must suppose the evidence to be true. It is not for him to exercise any judgment on this point, but to regard it as all true, without restriction or qualification. This is an important difference, and it may be fairly questioned whether this additional ingredient in the terms of the query, would not have obviated the practical difficulty contemplated by the English courts. It thus becomes the hypothetical case which they require. It may have no foundation in truth. It may have no more reality than the baseless fabric of a vision, yet for the present purpose, it is to be regarded as true, and made the basis of an opinion. It is immaterial, certainly, whether the hypothetical case is presented in the language of the counsel, or of the witnesses,—whether it is to be received directly from the latter, or, at second hand, by a tedious process of circumlocution.

That the rule would have been modified in the manner here supposed, seems not unlikely in view of the fact, that in other cases, similar in principle, the question as put in the *Rogers case*, was allowed, though objected to by counsel. In *Malton v. Nesbitt*, 1 Carrington & Payne, 70, (1824,) and *Fenwick v. Bell*, 1 Carrington & Kirwan, 312, (1844,)—cases resulting from collision of vessels—where the question at issue was one of negligence or unskilfulness on the part of the master, nautical

men who had attended the trial, were asked, whether, *supposing the evidence to be true*, the master was, in their opinion, guilty of negligence. In *Beckwith v. Sydebotham*, 1 Campbell, 116, (1807,) this mode of putting the question was sanctioned by Lord Ellenborough. The question at issue was the unseaworthiness of a vessel, and eminent surveyors of ships were allowed, upon the evidence of other witnesses, to give their opinion on this point.*

The principal, if not the only objection, to this mode of putting the question to experts, is that it essentially removes the expert from the witness-box to the jury-box, and allows him to usurp the functions of both judge and jury. How a witness can

* The case of *Sills v. Brown*, 9 Carrington & Payne, 601, (1840,) and that of *Jameson v. Drinkald*, 12 Moore, 148, (1829), often cited in this connection, will be found, on careful examination, to furnish no support to the rule of evidence we are combating. They were both actions for damages on account of collisions of vessels. In the former the collision arose chiefly from a neglect of the rules of the river Thames, on each side. The question at issue was whether the admitted fault of one party rendered him responsible for the consequences that arose from the admitted fault of the other; whether the departure from the rule of the river, which led to the injury was excused by the common practice of infringing that rule? A harbor-master was called, of whom it was proposed to ask, whether, having heard the evidence in the cause, he thought the conduct of the captain of the brig, who had departed from the rule, and thus brought about the collision, was right or not; because, said the counsel, it is a matter of skill, and he compared it to cases in which a medical question arises, and then witnesses are asked, whether, in their opinion, the treatment was correct or not. The court did not see it in this light, and overruled the question, but allowed the opinion of the witness to be taken on a hypothetical case. It was obviously not a matter of skill that could be correctly understood only by experts, but one of plain facts which the jury were perfectly competent to understand and appreciate. What the hypothetical case was, does not appear; but it is obvious that the answer, whatever it was, could not have affected the conclusions of the jury, because, at the best, the witness could only have said, that in infringing the rule of the river, the captain was not to blame, for the simple reason that everybody else infringed it. On such a point as this, the jury could make up their minds without the aid of an expert. It should be observed that the ground on which the counsel claimed the admission of this testimony, was the similarity of the case to those where medical experts are allowed to express an opinion on the evidence, implying, of course, that in the latter instance, this is the settled rule. In the latter case above referred to, *Jameson v. Drinkald*, several nautical men gave their opinions, as experts, touching the alleged negligence, unskillfulness, and error of judgment, manifested by the parties. On the motion for a new trial—for which, however, this mode of examining the experts was not put forth as one of the grounds—two of the judges said, incidentally, it would seem, that the experts should have confined their opinions to the cause of the accident, not the measure of blame attributable to one party or the other; or, as one of them said, a scientific person, called as a witness, is not entitled to give his opinion as to the merits of the case, but only as to the facts as proved by other witnesses. The objection, be it observed, did not lie against the basis of their opinions, but against the opinions themselves, as referring to points with which they had no proper concern. Not a word was said by court or counsel about a hypothetical case.

be said to usurp the functions of the jury, who may, if they please, render a verdict in the very teeth of his opinion, is not very obvious. If the jury chose to shape their verdict by his opinions, they no more surrender to him their functions, than they do to the court or counsel whose remarks may influence their decisions. Neither is it easy to understand, so far as this issue is concerned, why the opinion of the expert upon the facts which have appeared in evidence, should be more objectionable than his opinion upon a hypothetical state of facts, because if the latter is at all similar to the former, his opinion upon it may equally affect the conclusions of the jury. Lord Brougham, in his remarkable version of Lord Hardwicke's decision, seems to have appreciated the force of this conclusion, by prohibiting the expert from giving his opinion upon the evidence in any shape. "You shall ask them," he says, "if such a fact is an indication of insanity or not—you shall ask them, upon their experience, what is an indication of insanity—you shall draw from them what amount of symptoms constitute insanity," "but you must not ask a witness whether the facts sworn to by other witnesses preceding him amount to a proof of insanity." 67 *Hansard*, 614. So, too, in the case cited above, Lord Campbell said, "The witness may give general scientific evidence on the causes and symptoms of insanity, but he must not express an opinion as to the result of the evidence he had heard with reference to the sanity or insanity of the testator." Not a word is said in either case about making a hypothetical statement of facts.

To say that an expert, in expressing an opinion upon the facts given in evidence, is thereby assuming the functions of the jury, indicates a confusion of ideas in a quarter where it would have been least expected. Nothing would seem to be plainer than the distinction between the duty of the jury and that of the expert, and that distinction authorizes no apprehension of their being confounded under any tolerably intelligent administration of the law. The jury are bound to decide for themselves as to the truth of the facts which appear in evidence. What those facts may signify, it is for the expert to say. To render a just verdict, the jury must of necessity rely more or less on the opinions of the experts. So far as those opinions are allowed to influence the verdict, so far may the expert be said to assume the functions of the jury, but be it observed, in the legitimate performance of his own part. Perhaps the opinion of the expert may be decisive of the question at issue, and thus determine the verdict. And why should it not? If that opinion is correct, it would be highly reprehensible in the jury to disregard it, although not bound by any legal enactments. When a person is convicted of some criminal act, though regarded by men long

familiar with the phenomena of insanity to have been insane at the time of its commission, the jury no more deserve the praise of intelligence and courage, than if they had disregarded the calculations of a mathematician on a question of water-power.

In the construction of a doubtful rule of evidence, it would seem as if that should be preferred which let in upon the jury in the largest measure, the light of science and liberal knowledge,—directly and clearly, without the intervention of refracting media. What the jury want is light upon the dark points of the case before them. The question is not what may be the expert's views in regard to the mental condition of A, B, C, or any other individual, real or imaginary, but what he thinks of the only person with whom the court has any concern. In a case involving a question of insanity, the expert is called in expressly to give the jury the benefit of his special acquaintance with the subject,—a benefit which he has a right to give, and they a right to receive—and thus assist them in arriving at a correct verdict. For this purpose he hears all the evidence, and carefully forms his opinion upon it. The next step, it might be naturally supposed, would be to express that opinion on the witness stand. But here the new rule is interposed, and the expert is told that he must not utter a word respecting the case, the details of which he has been following day after day; perhaps for weeks together, but he may tell them what he thinks about some other case. The admirable fitness of this rule for promoting the ends of justice must be obvious to the dullest apprehension. The jury, embarrassed and perplexed by a multitude of traits and incidents, the full significance of which is utterly beyond their reach; anxious to get at the truth, but unable rightly to appreciate the facts on which it is to be founded, would gladly avail themselves of the superior insight of men to whom such facts are familiar as household words, but this privilege is refused. Experts may be called, it is true, but they are to talk about anything rather than the case in hand—the only case regarding which the jury care to have their opinion at all.

But, it is replied, you may state a hypothetical case, embracing all the essential facts related by the witnesses, and thereby obtain from the expert precisely the same opinion as if the question had been put to him according to the formula used in the State courts. If this is really so, it is not very clear how the technical difficulty is avoided. You may not ask the expert, say the court, whether, supposing the evidence to be true, he believes the party to have been insane, but you may repeat to him in detail all the symptoms and occurrences related by the witnesses, and ask him whether, supposing them to have really happened, the person concerned was insane. If there is any dif-

ference between these two propositions, it seems to be very much like that between "Come out here, Mr. McCarthy," and "Mr. McCarthy, come out here." In neither case is the expert bound to believe that the facts on which he founds his opinion, have actually occurred, while in both, it is understood that these facts, whether real or imaginary, are precisely the same. It is hardly credible that a difficulty like this, which could be removed by a paltry shuffling of words, should be allowed to change a rule of evidence universally recognized in the courts of the country. Besides, if the case put to the jury is precisely that which has appeared in evidence, it is but little better than quibbling to call it a hypothetical case. It certainly is regarded by jury and expert as the case which is on trial, and in spite of any modification of language or change of subordinate points, the opinion of the latter will inevitably be shaped by what he has heard from the witnesses. If, on the other hand, a case truly hypothetical is put to the expert, then it needs but little reflection to see that the less it resembles the case exhibited by the witnesses, the less will it enlighten the jury in the formation of their verdict. But this method is not only useless, it is positively mischievous. It is very easy for counsel, by suppressing some circumstances and adding others, to present a case sufficiently like the one on trial, to seem to the jury the same, but really so different as to elicit from the expert, an opinion very different from that he had formed respecting the actual case, and which, perhaps, he had already expressed. The jury are mystified by such apparently contradictory views, and it would not be strange if they concluded to disregard such deceptive lights altogether, and rely on their own unassisted judgment.

Another objection to this new mode of obtaining an expert's opinion is, that it violates one of the settled rules of philosophy. It is well understood among scientific men that they are not to enter on the discussion of facts that have not been carefully observed, and duly authenticated. The true disciple of modern science will scarcely allow himself to talk of the attributes and incidents of a thing that never had an objective existence, because, if the thing never really existed, we are liable, with our limited faculties and scanty knowledge, to attribute to it incidents more or less incompatible with one another. A hypothetical case must be always open to this objection, that being the offspring of fancy it may be such a case as never did and never could exist in nature; and therefore that the opinion of an expert on such a case must be more or less unreliable. Indeed, nobody supposes that the hypothetical cases stated by counsel always represent cases that have actually occurred, for it is well understood that they may be merely a collection of such

particulars as best suit the counsel's purpose. Were we to enumerate a train of symptoms chosen at random, and ask an expert what disease they would signify in a patient who should exhibit them, we should commit no greater absurdity than the counsel does who picks out an incident here and there from a man's conduct and discourse, and then asks the expert on the witness-stand, if he considers them as conclusive proof of insanity.

It would seem as if the soundness of this principle would be instantly recognized by lawyers, with whom it is a sort of professional rule never to give counsel on a suppositious case. We know very well what would be the reply of any lawyer having the slightest regard for his reputation, to one who should seek his opinion in this manner. "If the case you put is merely a matter of speculation or curiosity, I am willing to talk about it, but if you wish my opinion for a practical purpose, on a case that has a real existence, you must state that case with all its particulars, without addition or suppression; and since your imperfect knowledge of these things must lead you unconsciously to misrepresent the case, you had better get a lawyer to state it for you." And yet, when the opinion of an expert on a matter of science is required, distinguished lawyers say he must not be asked about facts which have been stated with all that precision and completeness which only a judicial examination can secure, but you may draw upon your memory or your imagination for the materials of a hypothetical case, and ask his opinion about that. A fiction, an acknowledged creation of fancy, is supposed to serve the ends of truth and justice better than actual facts!

Thus far we have gone upon the supposition that the rule now advanced, is at least, practicable. Unquestionably, it may be in many cases; but in those cases, by no means few, where the facts touching the mental condition of the party proceed from a cloud of witnesses, each one contributing something towards the general impression which is made upon the mind of the expert, it cannot be strictly carried out without manifest injustice. We had an opportunity a few months ago, of seeing it applied in a criminal trial, in a federal court held in a neighboring district. A ship-master was on trial for beating to death one of his crew, and defended on the plea of insanity. After a large number of witnesses had been examined, the prisoner's counsel proceeded to put the question to the experts in the usual way, whereupon the District Attorney objected, and his objection was sustained in an elaborate opinion from the circuit judge. No better illustration of the folly of the rule could be had than was furnished by the actual result of all the discussion which it provoked on this occasion. The court having pronounced its decision, the follow-

ing colloquy took place between the court and the prison's counsel:

Counsel.—I may assume a state of facts, I suppose?

Court.—Unquestionably that may be done. That is the decision of Judge Curtis.

Counsel.—Then am I to ask the witness thus: Taking all the facts as testified by the mother of the prisoner, the statement of Capt. F., and then the account given by C., &c., what would be his opinion as to the state of the prisoner's mind, or am I to read over my notes, and point out certain facts?

Court.—You can ask your question.

Counsel.—(To witness.) Taking all the testimony of Mrs. H. in regard to the condition and history of her son up to the time of this occurrence of the 22d of January; the statements and testimony of young C. as to the sickness, which, prior to the 22d of January, the prisoner had endured; all the testimony of his previous life which goes to show his nervous sensibilities; the testimony of Capt. F. and Capt. N. as to the occurrences at the Chincha Islands; and the extent of the injury which occurred to him there; the testimony of C. and F. in regard to the occurrences of the 22d of January, during the whole of that day and the succeeding and following days and nights, until they arrived at P——, upon the assumption and basis that all that testimony is true and believed by the jury, what, in your opinion, was the mental condition of Capt. H. on the 22d of January?"

Here were a multitude of transactions bearing upon the question of the prisoner's mental condition, every one of which it was necessary for the expert to take into the account in making up his opinion. They could not be stated hypothetically in any other language than that of the witnesses, with all the collateral circumstances, and so obvious was this, that neither the opposing counsel nor the court objected; and thus, in this case, the new rule was utterly disregarded. Thus, we apprehend, it must always be disregarded, where the evidence unfolds a large mass of particulars essential to the right understanding of the question at issue.

It is a curious fact, not without some significance, we imagine, if we could but see it, that in all the cases where the new rule of evidence has been applied, the question at issue was one of mental disease, while in cases where it was a question of other diseases or wounds, no objection has been made to the application to the old rule. In the trial of Capt. Donellan for the murder of Sir T. Broughton (1780) for instance, several physicians had stated the symptoms observed before death, and the results

of the autopsy after death, when the celebrated John Hunter was called, and examined as follows :

Question.—Have you heard the evidence that has been given by these gentlemen ?

Answer.—I have been present the whole time.

Q.—Did you hear Lady Broughton's evidence ?

A.—I heard the whole.

Q.—Did you attend to the symptoms her ladyship described, as appearing upon Sir Theodosius Boughton, after the medicine was given him ?

A.—I did.

Q.—Can any certain inference upon physical or chirurgical principles be drawn from those symptoms, or from the appearances externally or internally of the body, to enable you, in your judgment, to decide that the death was occasioned by poison ?*

Had the question been whether or not Capt. Donellan was insane when he took the life of Sir T. Boughton, then probably the court would have said, Mr. Hunter must not be asked what opinion respecting the prisoner's mental condition the evidence has led him to form, but he may give his opinion on a hypothetical state of facts. He has no right to believe that a single word which he has heard from the witnesses is true, but you may set up a fictitious Capt. Donellan and a fictitious Sir Theodosius Boughton, and an imaginary chapter of incidents, and ask what he thinks about them. This, and numerous similar instances which might be cited did our limits permit, constrain us to ask, why this distinction ? Is it because insanity is supposed to be plead in defence of crime more frequently than it should be, and therefore to be met with every kind of restriction and hindrance which the practice of the law will permit ? If this is the reason, we need only say that there never was a greater mistake than to imagine that error or nonsense can be put down by denying it fair play and full discussion.

We are brought to the conclusion that the rule in question is not calculated to promote the ends of justice and humanity ; and that a true reform would be to confine the expert to the case in hand as revealed by the evidence, and debar him entirely from giving opinions upon hypothetical cases. Such a course is not entirely without judicial sanction. In the trial of Prescott for the murder of Mrs. Cochran in New Hampshire, (1843,) the defence being insanity, an expert was asked by the attorney-general the following question : " If no act of violence precede or follow the fatal deed, and no apparent motive can be found

* Trial of Capt. John Donellan, &c., reported by Joseph Gurney. Quoted by Beck II., p. 792.

for the murder, should you believe a homicide to be insane, merely because he has insane ancestors?" To this the prisoner's counsel [Hon. Ichabod Bartlett] objected, simply because it was improper to get the opinion on a supposed case. The attorney-general replied that "the prisoner was setting up the plea of insanity on the ground that some remote ancestor of his was crazy; and that the court would perceive that the question was only to get the opinion of the witness on a case precisely such as may be proved to exist in this instance." The court [Chief Justice Richardson] observed "that the question being founded on a supposed case, could not properly be put."*

If we are to have a new rule on the subject to prevent the expert from encroaching on the province of the jury, let it be that laid down by lords Hardwicke and Brougham, whereby the expert is debarred from giving opinions respecting the case on trial, or any other case, and allowed only to answer questions as to the causes, symptoms and other incidents of insanity. In this way very important information would no doubt be kept from the jury, but the mischief arising from hypothetical cases would also be prevented.

Until within a few years it was allowable in this State, as it still is in every other, except Maine, in cases which involved any question of medical or other physical science, for the counsel in the course of their address to the jury, to read from scientific books of established reputation, for the purpose of supporting their positions. They read what books they pleased, and were scarcely restricted in the length of their readings. The extracts thus read constituted in fact, a part of their address, of which the jury might believe as much or as little as they did of any other part of it. They might avail themselves of the information thus presented, or regard them as only a professional contrivance for misleading their sense of right and wrong. This practice, which might have been supposed to be established by right of prescription, was formerly prohibited in the case of *Commonwealth v. Wilson*, 1 Gray, 339 (1852). The remarks of the court, (Chief Justice Shaw), conveying this extraordinary decision, which reversed the almost universal practice of this country and of England, were quite brief, and do not show very clearly what new light has suddenly dawned on the judicial mind. "Facts or opinions," says the court, "on the subject of insanity, as on any other subject, cannot be laid before the jury except by the testimony, under oath, of persons skilled in such matters. Whether stated in the language of the court or of the counsel,

* Report of the Trial of Abraham Prescott for the murder of Sally Cochran, &c., &c. Concord N. H.: 1834.

in a former case, or cited from the works of legal or medical writers, they are still statements of fact, and must be proved on oath. The opinion of a lawyer on such a question of fact is entitled to no more weight than that of any other person not an expert." In support of this decision, which we have given entire, there are cited only two cases, *Collier v. Simpson*, 5 C. & P., 73, (1831,) and *Cox v. Purday*, 2 C. & K., 268, (1846,) and as they are the only cases likely to be referred to for this purpose, it will be proper to give them a careful examination.

In the latter case, there was a question relative to the law of copy-right in Bohemia; and in order to settle this question, the counsel proposed to read the book containing the written laws of that country, but the court decided that "the proper course to ascertain the law of a foreign country, is to call a witness expert in it, and ask him, on his responsibility, what that law is; not to read any fragment of a code which would only mislead." Here the essential question—that on which the verdict of the jury depended—was as to the law of Bohemia on a certain subject. This simple fact it was necessary to prove beyond a doubt, and therefore the written code was offered *as a piece of evidence*, like an account-book or an affidavit. The court, considering that it lacked some element of proper evidence, refused to allow it to be read. Unquestionably, the counsel might have read it in the course of his plea to the jury, but that would not have suited his purpose, which required that it should be presented in such a form that the jury would be obliged to believe it like any other evidence. The other case—*Collier v. Simpson*—was precisely parallel. It was an action of slander brought by the plaintiff against the defendant, for saying that he, the plaintiff, had caused the death of a child by giving it an excessive dose of corrosive sublimate. The counsel proposed to show what was a proper dose of this article, by reading from medical books which treat of the doses of medicines; and this the court would not permit. They were offered *as evidence*, not as a part of the counsel's address, in which latter form they would no doubt have been allowed.

If, however, we are mistaken as to the principle decided in these two cases, and it should appear that in order to show what is the law of a country, it is not allowable to read the statute-book in any stage of the trial, then of course we must admit their authority for the rule, that facts or opinions on the subject of insanity cannot be laid before the jury by reading from medical books; and, if we do not misapprehend the matter, the rule applies to all books whatever from which a scientific fact or opinion could be obtained. We can hardly believe that any court would insist on the universal application of a rule like

this, which might keep from the jury information that could not be presented in any other form, and which alone would enable them to make their verdict just. We can easily conceive of cases where common sense and the natural instincts of men would forbid it. On a question of hydraulic power, it can scarcely be doubted that an expert would be allowed to read from a book the algebraic formulæ underlying his opinions. And if he could read the book, why might not the counsel? If, in a case of marine insurance, the counsel should propose to establish some fact respecting the soundings near a certain rock or shoal, by reading from Blunt's Coast Pilot, and were stopped by this rule, who would not feel that an important source of information was shut out, more calculated to affect the result of the cause, perhaps, than all the evidence of the witnesses and experts? Again, suppose in a criminal case where the offence occurred several years ago, an essential witness should state that he saw and distinctly recognized the prisoner near the scene of the crime, at 10 P. M., by the light of the full moon, should the counsel be debarred from reading an old almanac to show that on that night the moon did not rise till 12? The idea that the testimony of Professor Pierce or Mr. Bond is competent to establish such a fact, is simply ridiculous, because their knowledge of it would be derived, not from personal recollection, but probably from the prototype of the very almanac which cannot be read. As if evidence which is inadmissible at first hand, becomes entitled to the utmost credence at second hand.

It might, at first blush, be supposed that the rule in question had reference exclusively to medical or other scientific books, but it is clearly and explicitly stated, "that facts or opinions on the subject of insanity, as on any other subject, cannot be laid before the jury, except by the testimony, under oath, of persons skilled in such matters." Whether the question at issue be one of physic or divinity, of morals or legislation, navigation or manufactures, no fact or opinion thereon can be laid before the jury, except on oath. It would seem as if the law itself were not exempted from the general ban, because it is stated that the objection is equally strong against statements of fact or opinion, whether conveyed in the language of court or counsel in a former case, or cited from the works of legal or medical writers. Indeed, in the very trial which elicited this decision, the counsel were not allowed to read, for the instruction of the jury, from the judge's own charge in a previous case. If the court meant to exclude only so much of the charge as conveyed opinions respecting the nature of insanity in relation to crime, then certainly it would be but a fair application of the rule to exclude Coke and Hale and every other writer who has promulgated opin-

ions on this subject. We imagine the profession as hardly ready for this, though the conclusion seems to be inevitable.

The rigid application of the rule would also much abridge the latitude of remark allowed to counsel in addressing a jury, yet so far as opportunity has been afforded, we have failed to see any difference in this respect. In that very court, a year or two since, we heard the counsel in a case involving the question of the mental condition of one of the parties, relate his personal experience in insanity while a trustee of the McLane Asylum. It was strictly pertinent to the case in hand, and well calculated to enlighten the minds of the jury on an obscure point; but, though neither court nor counsel objected, it was in direct conflict with the rule, for certainly here was a statement of fact and opinion laid before the jury by one not under oath, and therefore not more admissible than similar statements drawn from a book.

It would seem as if the practice universally allowed to counsel in this country, of reading books in the course of their address, must have been attended by grave inconveniences, or open to very serious technical objections, to warrant this total and summary abolition. In the authorized report of the case quoted from above, it does not appear what these objections are, with the single exception, briefly stated by the court, that it infringes the well-known rule of law which requires that all statements of facts must be given under oath. It must strike the dullest observer as a very curious fact, that a practice like this should have prevailed here and in England, until quite a recent period, without the least suspicion that it was an infringement of a well settled rule of law. Indeed, this fact alone is calculated to destroy the validity of the objection, for the idea of a rule being well settled which is daily infringed without the cognizance of those who ought to know it best, implies something very like a contradiction in terms. All this confirms the construction we have put upon the two cases relied on as authority for the rule, (one of which, it will be observed, occurred twenty years before,) viz., that the point they decided was, that books could not be read as evidence to be received by the jury like other evidence, and consequently believed if credible and not contradicted, though allowable as a part of the counsel's address to the jury, and which, like any other part of it, the jury may believe or not, as they please.

Whether or not the rule in question was required by professional considerations its tendency is, as already intimated, to shut out important information, and to that extent defeat the ends of justice. It is easy to say that a scientific fact or opinion must proceed only from the mouth of an expert. but a little

reflection will show that sometimes the rule must imply an impossibility. The fact or opinion may be true, and yet not known to any accessible expert. In the rapid progress of modern science individuals of distinguished reputation perhaps may be left behind, and the knowledge which is essential to the cause of justice, they may be unable to furnish. In a case of suspected poisoning by arsenic, for instance, an expert might express the opinion that the deceased was killed by arsenic, because, although the contents of the stomach and intestines showed no trace of this mineral, it was found on analysis in the liver or spleen. Better proof than this could not have been had not long since; the jury would have convicted the prisoner on the strength of it, and the court would have approved of the verdict. But supposing the prisoner's counsel should ascertain, as he might at the present day, that the validity of this test had been recently impugned; that a distinguished chemist had found, by a course of satisfactory experiments, that arsenic could be detected in the liver or other viscera, where poisoning had not and could not have been suspected, as well as in many other substances not usually supposed to contain it, yet under this rule his client is to be denied the benefit of this discovery, and in consequence thereof, be punished for a crime, perhaps, which he never committed. No expert whom he could call has ever repeated the experiments, and the book which contains them cannot be read to the jury. Thus, in order to avoid a technical difficulty of doubtful existence, an innocent person is convicted on the ground of a scientific conclusion known to be false.

It should also be considered that the attendance of experts, however necessary it may be to secure the end of justice, cannot always be commanded. The trial may be in a place remote from any populous community where such persons naturally congregate, or the party is unable to incur the expense of engaging their services. If neither books nor experts can be used in a case involving questions of science, then the jury are without any means of arriving at the merits of the case, and their verdict is as likely to be wrong as right. Are we willing, is it proper that cases of this description should be submitted with no other light than such as common witnesses can furnish?

Books are inadmissible, it is said, because they cannot be cross-examined. Neither Esquirol, nor Astley Cooper, nor John Hunter, nor any other scientific celebrity, could have avoided a cross-examination, if they had been put upon the witness stand, and shall we allow them to do by means of their books what they could not do by word of mouth? This argument would be valid, no doubt, were books really offered as evidence, but since they are merely presented to the jury to receive as much or as

little weight as they choose to give them, there is no propriety in excluding them because they lack an essential attribute of evidence. If the book cannot be cross-examined, we must also consider that it has not the same weight as a living witness. In many respects, however, the book has an advantage over the witness as a means of eliciting truth on a difficult question of science. Its facts are accurately stated, its conclusions are carefully and deliberately matured without the possibility of being warped by any casual bias, and their correctness is guaranteed, perhaps, by the distinguished reputation of its author. The witness, on the contrary, under the unusual embarrassments of a harassing examination, is apt to say what in his cooler moments he will not thoroughly approve, and lay down principles without those qualifications which a little farther reflection would suggest. Professional rules and modes of procedure sometimes lead to principles and practices rather startling to the unsophisticated common sense, but we pardon the evil for the sake of the greater good which can be obtained so well in no other way. But to choose the extemporary utterances of a witness rather than the matured conclusions of a good book, "the precious life-blood of a master-spirit," as Milton calls it, would seem to be one of those unfortunate positions into which only the most inevitable necessity could force us.

It has also been objected to the practice of reading books, that, as no restrictions can be placed on it, the jury are unable to discriminate between such as are really entitled to be regarded as authorities, and such as are not so regarded by those most competent to judge. To them all books are alike—one entitled to as much credit as another. Such, no doubt, is the fact, but we are inclined to believe that in practice it never leads to erroneous conclusions. Counsel would hardly venture to effect their purpose by reading the books of obscure or visionary authors. If a sense of professional honor would not deter them, the certainty of exposure from the opposite side probably would. In looking over the reports of trials where the practice in question was allowed, we have not met with a single instance in which counsel availed themselves of their privilege to effect their purpose by means of worthless books. But should the attempt be made, there would seem to be no practical difficulty in requiring of the court suitable direction on the subject. Considering the frequency with which questions of insanity are submitted to judicial investigation, is it expecting too much of judges that they should make themselves familiar with the leading works on the science? We are glad to see that one of their own number regards such studies as a matter of professional duty. "I believe," says he, "that those judges who carefully study the medical wri-

ters, and pay the most respectful but discriminating attention to their scientific researches on the subject, will seldom if ever submit a case to a jury in such a way as to hazard the conviction of a deranged man." (Hornblower, C. J., 1 Zabriskie 196.)

The common law has been called by an eminent legal writer, "the precipitate of the wisdom of all ages—all professions—all countries."* The statement may be somewhat exaggerated, but it would have been utterly devoid of truth, we may be sure, had not the light of science been sometimes admitted into its dark and devious passages. The great luminaries of the law, so far from despising the teachings of science, were careful to learn and understand them thoroughly, wherever it had any bearing upon professional points. On the subject of insanity Lord Hale must have made himself familiar with all the learning of the time, the latest as well as the oldest, and received its results in a docile spirit, before inditing that passage in the "Pleas of the Crown," which has guided the opinions of the profession on the law of insanity almost up to the present moment. Very different from this, we fear, is the spirit in which this subject has been too often regarded in later times. Instead of being carefully studied by the light of modern investigation, its doctrines have been frequently treated as the speculations of visionary men, used by ingenious counsel for the purpose of screening their clients from the consequences of their crimes, when all other means have seemed likely to fail; and the men who unwillingly turn away from their customary duties to contribute the results of their large observation towards the furtherance of public justice, are they not habitually viewed as intruders into a province that does not rightfully belong to them?

The question whether a person is or is not insane, is not one of simple fact, but rather of inference from certain facts. Such and such phenomena being given, required their psychological significance; and the answer to this question should ever faithfully represent the actual state of psychological science. And inasmuch as this has not been stationary, the answer at different periods must have been marked by diversity and change. Uniformity, instead of being necessarily a test of truth, might have been only an indication of ignorance and presumption. To say that we are no better prepared to answer the question than our forefathers were in the days of Lord Hale, is virtually to ignore the existence of those establishments where the phenomena of the disease are exhibited on a large scale; of those distinguished observers who have given their days and nights to the study of its victims; of those works which contain the fruits of so much

* Wharton on Mental Unsoundness, 36.

toil and thought. If we admit these things do really constitute a better preparation for the duty, shall we deny ourselves the benefit of any one of them? You are willing to hear a living man, however feeble his utterance, but greater men who speak to the world only through their imperishable works, are condemned to silence. Why be guilty of a folly like this? If the common law is ever to deserve the merit which some of its advocates already claim for it, of faithfully reflecting the general enlightenment of the age, it must welcome the teachings of science and place no obstacles in the way of its communication.

We are indebted to the Monthly Law Reporter, Boston, for the foregoing interesting essay on the doctrine of Expert Testimony.

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VIRGINIA CASES.

District Court at Williamsburg.

*Present, JUDGES MONCURE, of the Court of Appeals, CLOFTON, MEREDITH,
TYLER, and COLEMAN, Circuit Court Judges.*

Stacy v. Hall & Co.

If goods be sold to J. B. P. S. at the request of G. B. S., and upon his credit and responsibility, he is liable to be the vendor for the price of said goods.

If the goods were sold to J. B. P. S. upon the promise of G. B. S. to pay the vendor for said goods, if they were not paid for by J. B. P. S., the vendor cannot recover the price of said goods of G. B. S., unless such promise or some memorandum thereof was in writing and signed by him or his agent.

A notice to take depositions in the city of New York, given in Henrico County on the 7th and depositions to be taken on the 31st of the same month, held to be sufficient.

This was an action of assumpsit brought, in the County Court of Henrico County, by D. K. Hall and K. C. Gambill, merchants trading under the firm and style, D. K. Hall & Co., New York, plaintiffs, v. G. B. Stacy, of Henrico, defendant, to recover \$180 93, balance of account due to the said firm for a purchase alleged to have been made by the said defendant. The declaration was in the usual form, with the several common counts in assumpsit, and the defendant not appearing at rules, the case proceeded to an office judgment.

At the quarterly term of the Court in March, 1857, the case was heard, and the jury found a verdict for the defendant, which upon plaintiff's motion was set aside, and a new trial awarded upon payment of the costs of former trial.

Again at the quarterly term of the court, in May, 1857, the case was tried, and the jury found a verdict for the plaintiffs, assessing their damage at \$180 93, with interest from the 7th day of November, 1857, till paid.

The only evidence offered by the plaintiffs to support their declaration, was the deposition of one John R. Ryan, the book-keeper of the plaintiffs, taken in New York, under a commission, after notice to the defendant. The notice was given on the 7th day of October, 1856, and the deposition taken on the 31st of the same month. In other respects the deposition was regular. It was as follows :

"John R. Ryan, a witness of lawful age, being first duly sworn, deposes and says, that he is a clerk in the employment of plaintiffs, D. K. Hall & Co., of the city of New York; that he knows defendant, G. B. Stacy; that said defendant called at the store of said plaintiffs, and ordered goods to be sold to his brother, promising that, if his brother did not pay for said goods, he, the said def't, would pay for them; that on his order, and relying on said defendant, the said plaintiffs sold and delivered the goods set forth in the bill hereto annexed and marked (A,) and sworn to by this witness; that said goods were charged to the def't on the books of the plaintiff; that the amount of said bill is \$180 93; that said amount was due and owing to the plaintiffs before suit was brought for recovery of the same; and that it has not since been paid, nor any part thereof."

Two instructions were asked at the trial. That asked by the plaintiffs, marked "A" in the record, was in these words :

"If the jury believe, from the evidence, that the goods mentioned in the bill of particulars were sold at the request of the defendant, upon his credit and responsibility, and were accordingly charged to him upon the books of the plaintiffs, then they must find for the plaintiffs, unless the defendant has proved that the plaintiffs have been paid for the same."

That asked by the defendant marked "B" in record, was as follows :

"If the jury believe, from the evidence, that the goods mentioned in the bill of particulars were sold at the request of the defendant to a third party, upon his guarantee that he would pay for them, if the third party failed to do so, it is insufficient to bind the defendant, unless the promise was made or reduced to writing."

The court gave the instruction "A," and refused the other, and the defendant excepted, as also to the ruling of the Court admitting the deposition offered by the plaintiffs to be read to the jury as evidence.

The court refusing to set aside the finding of the jury, on the defendant's motion, a supersedeas was obtained, and the circuit court of Henrico county, Judge Pitts presiding, affirmed the action of the county court. The defendant appealed to the district court.

August & Randolph, for the appellant.

Henry G. Cannon, for the appellees.

The following opinion was pronounced by the court :

"It seems to the court here, that the county court did not err in overruling the motion to exclude the deposition of John R. Ryan, from being read in evidence to the jury, nor in giving the instruction asked for by the defendants in error, marked A, but did err in refusing to give the instruction asked for, marked B, in the record mentioned, without giving some other instruction in lieu thereof, as such refusal was calculated to mislead the jury; and that the judgment of the circuit court is erroneous. Therefore, it is considered, that the said judgment of the circuit court be reversed and annulled and that the plaintiff recover against the defendant, costs by him expended in the prosecution of his writ of supersedeas here.

And the court proceeding to give such judgment as the said circuit court ought to have given, it is further considered, that the said judgment of the said county court is erroneous, and be reversed and annulled; that the last verdict of the jury be set aside, and that the plaintiff recover against the defendant his costs, by him expended in said circuit court; that the cause be remanded to the said circuit court, for a new trial to be had therein, on which new trial, if the evidence be the same as on the last trial, an instruction to be given in the form or to the effect following, if asked for by the plaintiff, in lieu of the instruction "B," viz.

"If the jury believe, from the evidence, that the goods mentioned in the bill of particulars, were sold and delivered by the court below, to the defendant's brother upon the defendant's promise to pay for the said goods, if his brother should fail to pay for them, then the defendant is not bound by such promise, unless the same or some memorandum thereof be in writing and signed by him or his agent.

Chatwell, &c., v. Pearman, &c.

Circuit Court of Carroll Co., Va., March Term, 1859.

Parol authority to execute an unsealed instrument is sufficient.

Parties sign a blank paper, but without adding seals to their signatures, intending it to operate as a forthcoming bond, and direct the sheriff to write the proper obligation upon the paper, which is done: *Held* to be a binding instrument.

Upon such an instrument an action of debt may be maintained without reference to any statute.

A wife's life interest in a slave may be levied upon by an execution against the husband. If a wife's life interest in a slave be levied upon to satisfy an execution against the husband, reference may be made to the value of that life-interest according to the tables of longevity, and such value will afford the measure of damages, upon failure to deliver the property, under a forthcoming bond.

The surrender of property levied upon is a sufficient consideration for the promise of a third party to deliver the property or pay the debt.

This was an action of debt. The declaration counted upon a *note*, with a condition, more fully set out hereafter. The pleas were *nil debet*, and a special plea denying that the defendants had made the instrument. After the evidence was heard, there was also a motion in arrest of judgment. The nature of the case, the facts proved, the question raised and authorities cited are so fully set out in the opinion of the court as to dispense with any preliminary statement.

Cook, for plaintiffs.

Poage, for defendants.

FULTON, J. This is an action of debt by the firm of *Chatwell & Davis* against *M. Pearman, Jr.*, and his sureties *Pickett & Hylton*. It has been tried before me without a jury, and there has also been a motion to arrest judgment.

On the 3d Nov. 1858, the plaintiffs sued out of the County Court of Carroll, two executions against the goods and chattels of the defendant *Pearman*, amounting in the whole to \$316. On the 12th January 1859, those executions were returned with the following endorsement on each: "Levied on the property of the defendant, to-wit—the life estate of his wife in a slave named *Susan*. Forthcoming bond taken." On the instrument so taken this action is founded. The facts as to the character and execution of that paper are as follows:

Prior to January 12th 1859, deputy sheriff *Hanby* levied on the slave, but left her in the defendant's possession. On that

day he sent another deputy, *Sumner*, with directions to remove the slave unless a forthcoming bond should be given. *Pearman* proposed to give the bond, and the other defendants agreed to become his sureties. *Sumner* had no blank bond with him, and none of the parties could write a forthcoming bond in due form. Thereupon the defendants wrote their names upon a blank sheet of paper and told *Sumner* to fill it up, or have it filled up, as a forthcoming bond in due form. There can be no dispute as to the fact of the authority to put the paper into the shape of a bond. That authority was ample and precise; and if the giving of such authority could bind the defendants in any case, they are bound in this. By oversight probably, or in ignorance of the legal effect of such omission, no seals were attached to the signatures of the defendants. *Sumner* afterwards had the paper filled up as a forthcoming bond in correct form, and corresponding to the execution; but no seals were attached to the signatures, so that it remains in fact only the note of the defendants, and has been so declared on. The slave was not delivered according to the execution of this instrument, and this action is the consequence of the failure.

The first question arising upon the pleadings and evidence is, whether this paper is binding upon the defendants; and that depends upon the question whether a paper signed or altered or filled up by one person, acting for another, under a mere parol authority, is binding upon him who gives that authority, when the paper is not under seal. If this were a technical forthcoming bond: if it purported to be the deed of the parties: if they had annexed seals to their signatures, it can hardly be doubted that such deed would have been void. A parol authority to make, alter or fill up a deed is inoperative and impotent. Upon the evidence in this cause in a plea of *non est factum* to a deed, the defendants must have had judgment. This is shown by the case of *Rhea v. Gibson*, 10 Grat. 215, and the authorities there cited.

But fortunately for the purposes of justice, and especially for the protection of the sheriff, this paper is not a deed. This is one of the few cases in which the omission of a technicality enables us to do substantial justice. In deciding upon the effect of the parol authority, given to *Mr. Sumner*, to fill up this instrument, we must look to the rules governing papers of a class distinct from deeds. And I am of opinion that a parol authority to make, sign or alter an unsealed instrument is valid and binding upon him who gives such authority. I have not been able to find any case in our own reports exactly deciding the question, but think the cases of *Boykin v. Smith*, 3 Mun.

102, and *Smith v. Jones*, 7 Leigh 165, recognize the principle with sufficient clearness. Looking beyond the decision of our own courts, I consider the proposition to be well sustained. See Parsons on Contracts, vol. 1, page 42: also same vol., page 205, where it is laid down that "the endorsement of a blank note binds the endorser to any terms as to amount and time of payment, which the party to whom he intrusts the paper inserts." Now I can see no difference between the endorsement and the signature of a blank note: and the case certainly is made more cogent by proof that here was no mere signature of a blank paper, but that such signature was accompanied by special directions which were carefully complied with. See also Chitty on Contracts, 210, and note (2) to page 71. Story on Promissory Notes, Chap. 1, Sec. 10, and 37.

Being of opinion then that the defendants are bound by this instrument, so filled up under their authority, I come to the question as to whether it imposes any obligation, and if any, then what is the extent of that liability. Those questions arise upon the plea of *nil debet* and the motion in arrest of judgment. And in the first place the defendants contend that such an instrument as this is not authorized to be taken by any statute, and that there is no consideration for the promise contained in the obligatory part of this paper. It is true that the statute concerning forthcoming bonds, Code, page 720, only provides that the officer levying a writ of *fiery facias* may take from the debtor a bond, with sufficient security, "containing the recitals and obligation therein directed. And it is also true that this paper is not a bond, though the only requisite of a bond which it wants is sealing. It is not therefore a bond in the language of the act: and the motion which may be made on a forfeited forthcoming bond could not be made upon this instrument, and the plaintiffs have been driven to a *suit* upon it. But though not a good statutory bond, I can see no reason why it may not be considered a valid instrument, independent of any statute. It was lawful for the sheriff to leave the property in the possession of the debtor, even without any statutory provision. There is nothing unlawful or uncertain in the character or terms of the instrument. It is an express promise in writing to pay a certain sum of money, the obligation to pay which might be avoided by the performance of a particular act, which act is lawful in itself. The parties are certain, the object is certain, the penalty is certain. Though the statute points out a particular course which the sheriff is obliged to adopt, and to which the plaintiff *must submit*, provided certain things be done by the defendant, I am ignorant of any law or principle which makes that course the exclusive

rule of action of the parties in the premises. I think they are at liberty to make any other arrangement which they might have made in the absence of the statute.

As to consideration, I have always understood it to be law that the release or suspension of legal proceedings, the surrender of property levied under execution, or the abandonment of any other vested legal right is a sufficient consideration for a promise. *Clinton v. Chambliss*, 6 Rand. 86, Chitty on Contracts 35, 59, *Lorryridge v. Dorville*, 7 Eng. Com. Law Rep. 43. Leaving the property in the possession of the defendant as a sufficient consideration for *his* promises, and this being an undertaking in writing by the sureties, any consideration which is sufficient as to him is sufficient as to them. Moreover, the authorities lay it down that when performance of an act, depending on the will of another, is engaged for, it is a good consideration." *McNeil v. Reid* 23, Eng. Com. Law, page 265, *Thornton v. Jenyns* 39, Idem 397.

It is further urged by the defendants that no obligation rests upon them by force of this instrument, because the property levied upon was not liable to seizure, and therefore no consideration arises from the leaving it in *Pearman's* possession. I cannot concur in that view. No authority has been cited to shew that the wife's life-estate in a slave, held in possession by the husband, may not be taken in execution for the husband's debts; and I certainly would not sustain such a proposition without most cogent authority.

I must therefore find for the plaintiffs on the plea of *nil debet*, and must also overrule the motion in arrest of judgment.

The plaintiffs are entitled to judgment for the sum mentioned as the penalty of this note, which is \$632, to be discharged by the payment of such damages as were sustained by reason of the non-delivery of the slave on the day of sale: and counsel have differed widely as to the measure of damages. *Mr. Poage* contends that the damages must be merely nominal, because it is impossible to estimate the value of the life-estate in the slave. *Mr. Cook* contends that the full amount of the executions against *Pearman* affords the proper criterion, both because the levy upon the slave is a satisfaction of the writs and no new execution can issue, and because the value of the life-interest can be estimated, and by his calculation it exceeds the amount of the executions. I think the value of the life-interest, which was the property levied upon, is the true measure of damages. In a motion upon a regular forthcoming bond, the value of the property seized is immaterial: the obligors are expressly made liable for the whole debt upon failing to deliver the property. But in this action I think the plaintiffs can only recover the

value of the property, and if that was not sufficient to satisfy the demand, the sheriff will be liable to make good the deficiency. It is easy I think to ascertain that value. Rules are laid down for our guidance in such cases. In this case it is proved that the slave would sell for at least \$700, at public sale, if sold absolutely. The interest on this sum would yield an income of \$42 *per annum*. It is proved that *Mrs. Pearman*, who is entitled to this income during her life, is now *twenty-seven* years of age. Her expectation of life, according to *Wiggesworth's* tables, is therefore about thirty-two years. Without going into any minute calculation, we may safely say that the present value of an annuity of \$42, to continue for thirty-two years, is a good deal more than \$316 31, the amount of the plaintiff's demand: so that by the measure of damages which I have adopted, the defendants are answerable for the whole of that demand.

Both issues are found for the plaintiffs; the motion in arrest of judgment is overruled, and judgment given in favor of plaintiffs for the penalty of the note, to be discharged by the amount of their executions, with interest and costs.

Kirkbride's Adm'r v. Chatwell and Davis.

Circuit Court of Carroll County, Va. August Term, 1859.

An executor cannot revoke his assent to a specific legacy: at least not without shewing some ignorance or mistake of fact on his part: and especially after the rights of creditors have attached to the subject of the legacy.

A specific legatee has an inchoate legal title to the chattel bequeathed to him: the assent of the executor only perfects that title.

It is the fault of the executor to deliver to a specific legatee the chattel devised to him, without ascertaining whether the chattel may be necessary to satisfy the other legacies: especially as he has the right to demand a refunding bond, before assenting.

An executor has no *lien* upon a specific chattel, to the bequest of which he has assented, to indemnify him against loss, arising from the demands of other unsatisfied legatees.

W. P. Kirkbride, administrator with the will annexed, of *John Kirkbride*, exhibited his bill to the Judge of this court, in vacation, alleging that his intestate died in 1858, having by his will, among other things, bequeathed a slave girl named *Susan*, to his daughter, *Polly Pearman* for her life, and to her children after her death, directing that *Mrs. Pearman* should "take said slave at valuation:" that by the residuary clause of the will the

testator directed the residue of his personal estate to be divided among his seven children: that said slave was valued at \$700: that the personal estate was believed, at the time of the testator's death, to be much more than large enough to pay \$700 to each legatee: that *Mrs. Pearman* and her husband, *Michael Pearman*, agreed to take the slave at her valuation, in part of *Mrs. Pearman's* share of the residue: that plaintiff thereupon delivered the slave to *Pearman* and wife who still held her in their possession: that believing the estate to be ample for his protection, plaintiff did not require any refunding bond from *Pearman* and wife before assenting to the legacy: that a large part of the personal estate of *John Kirkbride* consisted of debts owing to him: that after giving up the slave complainant ascertained that a large amount of these debts could not be realized; and he believed that enough could not be made out of the personal estate to pay each legatee as much as \$700: that he, complainant, would be responsible for any deficit: that *Pearman* was insolvent: that *Chatwell and Davis*, creditors of *Pearman*, had sued out execution for several hundred dollars and levied it on the slave *Susan*, the only property of *Pearman*, and the Sheriff was about to sell her: and he prayed an injunction to restrain *Chatwell and Davis* (who were the only parties to the bill) from causing the slave to be sold under the execution.

The injunction was granted.

The defendants answered, excepting to the jurisdiction of the court, and to the failure in making proper parties: and stated that their execution was against not only *Pearman*, but against two other parties, *Pickett and Hylton*, sureties of *Pearman*, who with the sheriff, were the parties really interested: alleging their belief that the assets were sufficient to satisfy the directions of the will, but if they were not sufficient, they insisted that it was no concern of theirs: the plaintiff had assented to the legacy, when he had full means of protection: that they had not personally meddled in the matter, but merely issued their execution which the sheriff, at the instance of the sureties, had levied on the slave: and they protested against being tied up in the recovery of their debt, until the estate should be wound up, and disputed questions settled among other persons, and as their execution had been levied, they could not proceed against the sureties.

Cook for the defendants, now moved to dissolve the injunction upon the bill and answer; and

Poage and *McCamant* for the plaintiff, opposed the motion.

The case was argued upon the questions of jurisdiction and

want of parties—but nothing turned upon those points ; and the questions made and authorities cited in the argument upon the merits, sufficiently appear from the judgment.

FULTON, J.

I granted this injunction with much hesitation ; but my rule has been to take what I consider the safe course, and award an injunction if I entertain any doubt. Subsequent reflection and the argument of the cause satisfy me that my doubts were proper ; and that the complainant is entitled to no relief. I shall not consider any question of jurisdiction or of parties ; for I think on the merits that the plaintiff must fail.

An executor is not bound to assent to a specific legacy, nor pay a pecuniary one till he be made safe. The law authorises him to demand a refunding bond before he can be compelled to part with the chattel or the money. This is a privilege conferred upon him by express statute, intended for his own case, and the safety of creditors and other legatees. But he may, of course, waive this right : and in this case the executor has waived it. In so doing he acted at his own peril. Should it hereafter turn out that this negro was necessary to equalize the distribution among the residuary legatees, the executor must bear the loss.

The assent of an executor to a specific legacy is not the origin of the legatee's right. That right is a legal one, depending upon the will. It is true that it is merely inchoate ; that it cannot be exercised until the executor shall assent ; but having assented, his assent only confirms the right, and the title relates back to the will. Lomax on Executors, vol. 2d, 133—side paging. Here *Pearman* had a legal right to this slave, through his wife at the testator's death : the executor having assented, and delivered possession, that right became complete : and there was nothing to prevent the levy of this execution upon the slave.

I cannot find any authority for the idea that an executor may assent to a specific legacy and yet retain a *lien* upon the subject of that legacy, for his indemnification against the consequences of his own act in giving that assent. Such an idea is at war with that which I have just advanced—to wit, that his assent merely perfects an inchoate title, derived from the will : and it receives no countenance from our statutory provisions concerning refunding bonds. Such bonds would be useless if such a lien existed. So far from their being any such lien, the legatee may sue for and recover the chattel from the executor, after such assent and the waiver of a refunding bond. There can be no doubt that he might successfully prosecute such suit in a court of equity : and I think the Court of Appeals has decided that he may maintain an action at law, in such event, as may be seen

by reference to *Nelson vs. Cornwell*, 11th Grattan 724: and the same idea seems to be sanctioned by Judge TUCKER in *Kayser vs. Leisher*, 9th Leigh, 357. If then the legatee may himself, under such circumstances, successfully proceed against the executor, I cannot imagine how the latter is to hold off a creditor of the legatee from the property.

Can an executor revoke his assent, so as to reinvest himself with a control over the chattel? In England it would seem not. Judge Lomax, on the authority of English writers, denies such a power to the executor. See his work on Executors, edition of 1857, vol. 2d, page 235, paragraph 16. It is true that in *Frazer vs. Beville*, 11th Grattan, at page 17, the Court of Appeals does sanction the proposition that an executor may under some circumstances revoke his assent. But they put it upon the express ground that such revocation must be made *before* delivery of possession of a specific chattel, or payment of a pecuniary legacy. They further qualify it by the requirement that the "recall is not to be attended with injury to a third person, as to a *bona fide* purchaser from the legatee on the faith of such assent." Now nothing in this language of the court can aid this executor. He never attempted to revoke his assent until long after delivery of the chattel, and after the rights of the legatee's creditors had attached to the property. In the language of Judge DANIEL his "assent had been completed by possession." It is plain also in this case that great injury would result to third parties: to these very defendants: if any attempt at revocation could be tolerated in this case. Their execution has, without any express act or direction of their own, been levied on this slave, when they had two solvent sureties, whose goods might have been seized. The operation of the writ is suspended till this controversy be adjusted, for no other levy can now be made. And the rights of those sureties are involved; for it was and is their privilege to have the estate of their principal held bound for their indemnity. And they contracted their liability, too, on the faith of *Pearman's* possession of this negro: for they became his sureties since he received her; and it was for her delivery to satisfy a former execution that they rendered themselves responsible. Creditors and sureties are as much entitled to the protection of the courts as *bona fide* purchasers: and this plaintiff could not be permitted to withdraw his assent, to their prejudice. Indeed he could not recall it as against *Pearman* himself, when that assent has been accompanied by delivery of possession. After such assent and delivery of possession, he has nothing more to do with the slave than if *Pearman* had bought her from a stranger.

The injunction must be dissolved.

(By subsequent arrangement, the debt was settled, and the bill was dismissed at the plaintiff's costs.)

Thomas v. Clark et als.

Circuit Court of Grayson County, Va., April Term, 1859.

The failure of a sheriff to give a new bond, when required to do so, according to the provisions of the three first Sections* of Chap. 146 of the Code, is a *forfeiture* of his office, and he cannot afterwards perform any of the functions of the office.

F. S. Thomas applied to the circuit court of Grayson for an injunction to prevent the defendant, *Hobson Clark*, from removing a negro from the commonwealth. *T. F. Perkins* and *F. J. McMillan* were also made parties defendants to the bill. Several reasons were assigned for the application, but the only point decided by the court will appear from the following statement extracted from the bill, answers and exhibits in the cause.

D. Fielder was elected sheriff of Grayson for the term of two years, commencing on the 1st of January, 1857. He duly qualified and gave his official bond; and appointed *T. F. Perkins* one of his deputies. At the March term, 1858, of the county court of Grayson, *Fielder's* sureties in his official bond presented their petition to that court, praying that they might be relieved from their suretyship. The court made an order requiring *Fielder* to give a new bond, and allowed him time till the next court to give it. The next term of the court was on the fourth Monday in April: and *Fielder* failing to give the new bond, the

* The following are the provisions:

"SEC. 1. When the surety (or his personal representative) of any officer required to give an official bond, shall petition the court by which the bond is taken, or in which, or the clerk's office of which, it is recorded, or the circuit court of the county or corporation in which (where the bond is not taken by or filed in any court or clerk's office) the officer resides, to be relieved from the suretyship, such court shall, on proof of reasonable notice of his intended motion, require such officer to give a new bond, in the same manner as if none had been given by him.

"SEC. 2. Upon such new bond being given, approved and accepted, according to law, the sureties in the former bond, and their estates, shall be discharged from all liability for any breach of duty committed by such officer, after that time.

"SEC. 3. If any such officer, being so required, shall fail to give such new bond within the time required by the court, he shall be deemed to have been guilty of a breach of official duty, and shall be forthwith removed from office."

court then made an order removing him from office : ordered that a special election should be held to supply the vacancy ; and appointed a *crier*, (according to the provisions of Sec. 24, Chap. 49, p. 250 of the Code,) to perform the duties of sheriff till a new officer could be elected.

Early in March, 1858, (and before any proceedings were had in court in relation to the sheriff,) the defendant, *McMillan*, sued out of the clerk's office of the circuit court a *fi. fa.* against the plaintiff, *Thomas*, which writ went into the hands of *Perkins*, the deputy of *Felder*. In April (and before the judgment of amotion against his principal) *Perkins* levied this execution upon two slaves and other property of *Thomas*. The writ was originally for upwards of \$2,200, but *Thomas* made several payments to *McMillan* after the levy was made : and he alleged that not more than \$400 or \$500 was due upon the writ on the 27th September, 1858. He also alleged that *McMillan* had agreed to hold up the execution. He also stated that his other property was sufficient to satisfy the writ without a sale of the slaves. All the property had been left in his possession after the levy. On the 27th September, 1858, *Perkins* took one of the slaves, a valuable negro man, to the court house, and sold him publicly, when the defendant, *Clark*, bought him at a price below his proved value. *Clark* was a trader in slaves, and intended to send the negro to Richmond for sale. A good deal of testimony was taken, but it proved to be useless in the view assumed by the court.

Cook, for the plaintiff, submitted that the failure of the sheriff to give the new bond was a vacation of his office : that the statute in terms made it a breach of official duty : that all his powers were superseded and assigned to the *crier* ; that the deputy could act no longer than his principal ; that he had, therefore, no power to sell the slave, and his sale conferred no right on *Clark* the purchaser.

Kent & Terry, for the defendants, insisted that an execution is an entire thing, and that the officer who has levied an execution is the one who must go on to sell : *Tyree and others v. Wilson*, 9 Grat. 59 ; *Same v. Donolly*, Idem, 64, and authorities there cited. They referred to Sec. 18, Chap. 49, page 248, and Sec. 18, Chap. 188, page 714, of the Code, to show that in case of the death of a sheriff his deputies may continue to perform the duties of the office ; and that it is only when the sheriff dies without any deputies, that it is necessary to have recourse to another officer ; and they assimilated this case to that of the death of the officer. They contended that the judgment of a motion referred only to any

new duties which the sheriff might be called on to perform ; and not to those in the discharge of which he might then be engaged and did not deprive him of the power nor relieve him from the duty of going on to sell property previously levied upon.

Cook, in reply, insisted that the statutory provisions, made for the performance of the duties of the sheriff, after his death, or the ordinary termination of his tenure of office, showed that the legislature never intended to permit him to act when deprived of his office as a penalty for breach of duty. If the legislature had intended this, they would not have left it to inference. In the other cases the official bond remains in force for the executors' protection : in the case of amotion it does not remain—for the very object of the removal is to protect the sureties. If we had paid this money to *Perkins*, after his principal's amotion, it would not have satisfied the execution, and we should have lost it—for the sureties were not responsible.

FULTON, J.

Much evidence has been taken in relation to matters not relevant to the cause in the view which I have taken. The plaintiff alleges in his bill, (and all the allegations have been contested,) that he had paid the greater part of his debt to the creditor ; that he had personal property other than slaves, more than sufficient to satisfy the execution ; that the creditor had promised him indulgence, and that the sheriff was so informed ; that the slave was of peculiar value as a family servant ; that he was sold without being legally advertized ; and that he was sold at greatly less than his value, and that the sale was improperly and unfairly conducted. I shall advert to none of the evidence on these questions ; nor shall I decide any of them. My opinion is founded alone upon the question of the officer's power to sell the slave.

I do not question the soundness of the position that, as a general rule, the officer who levied an execution is the one who must complete the proceeding by sale ; and that he not only may do so, but can be compelled to bring the matter to such conclusion, after his term of service has expired by efflux of time. Such was the common law ; it has been sanctioned by our highest court, and I do not understand the plaintiff's counsel as controverting it. It is also clear from statutory enactments that when a sheriff dies in office the duties may still be performed by the deputies whom he had appointed in his lifetime ; and it is only when he has no deputies at all, at the time

of his death, that it is necessary to invoke the aid of another officer. These two categories—that of an officer whose term of service has expired, and that of an officer who dies in office, embrace every case that can arise, except the very one now at bar—the case of an officer removed before his term has expired because of a breach of duty.

I am of opinion that the acts of a sheriff, done under color of his office, after he has been removed for breach of duty, no matter what that breach may be, are wholly void. I do not think he can afterwards lawfully do anything appertaining to the office. His authority is extinguished, his powers are entirely superseded. I think it differs *toto cælo*, and that the legislature intended to make it differ from either of the two classes of cases before spoken of. It stands as an exception to the rules, whether deduced from statutory principles or common law doctrines, which regulate the performance of the officer's duties in other cases.

Suppose judgment of amotion should be given against an officer, in consequence of the commission of a felony, (as was lately done in one of my courts;) could it for a moment be contended that he could continue to exercise the office either in person or by deputy. The very proposition is an absurdity; it involves not only a legal but a physical impossibility; for a felon in his grave or in his dungeon cannot act as a civil officer; nor can he delegate his authority to a deputy, for a deputy's powers depend upon those of his principal. Yet how does such a case differ except in degree from the one at bar. In express terms the statute provides that the failure to give the new bond shall be decided a *breach of official duty*, and that in such event the officer should be "*forthwith removed from office*." "Removed from office" can mean nothing less than a total deprivation of official authority, and "forthwith" can signify nothing short of the *immediate* operation of that deprivation.

No inconvenience can result from this construction, for the moment the court renders judgment of removal, it is authorized to appoint a *crier*, who is directed to perform all the duties of the office until a new sheriff can be elected and qualified. And this provision fortifies the construction which gives immediate and complete effect to the sentence of deprivation; for that provision is only necessary in such a case. The common law provides for the case of the termination of the period of office; the statute makes provision for the case of death in office; and the appointment of *crier* is only necessary when the sheriff is removed.

A grievous evil would result from a contrary construction.

The sheriff is removed at the instance of his sureties for the very purpose of discharging them from liability; he may have hundreds of executions, and all the claims for the taxes of the government and the county levies in his hands, yet upon the theory contended for by the defendants he can go on to collect by sale and distress thousands on thousands of dollars, with no security for their proper application save his own personal responsibility. The legislature could never have contemplated such a state of things.

If the plaintiff had paid this money to *Perkins*, either *Mc-Millan* or the plaintiff must have lost it; for the sureties would not have been bound, and I do not think it would have been a good discharge to the plaintiff.

The result is, that the sale by *Perkins* conferred no right upon *Clark* the purchaser; the latter cannot complain for *caveat emptor* is the rule of public sales: he had purchased from one who had no authority to sell; the injunction was, therefore properly granted to restrain him from removing the slave out of the commonwealth; and as the case has been set down for final hearing, the decree will be that the injunction be perpetuated, the sale set aside, the slave restored to the plaintiff, and costs be paid to the plaintiff by defendants, *Perkins* and *Clark*.

Decree accordingly.

Clark v. Virginia and Tennessee Railroad Company.

In the Circuit Court of Washington Co., Va., Sept. Term, 1859.

Confirmation of a report of assessment of damages to land is not necessary to enable an internal improvement to take possession of the land: but the Company may proceed to construct and use their work as soon as they pay the amount of the assessment into court.

The right to use a work of internal improvement is necessarily to be inferred from the power to construct it.

This was an action of trespass for killing the plaintiff's cattle. The declaration stated that the plaintiff was the owner of a certain tenement: that the defendants, without complying with the provision of the statute in such cases, entered into said tenement and laid out and constructed a railroad through the same without the plaintiff's permission or consent, and without making him any compensation, and without having the land condemned to their use: that the defendant did not enclose the said railroad, but had for a long time driven locomotives and cars, conveying passengers and goods over

their railroad : and that the plaintiff's cattle, passing from his fields upon the railroad, had been run over and killed.

The defendants pleaded first, "not guilty," secondly a special plea, substantially as follows : "That the defendants before entering upon the plaintiff's said tenement, had applied to the County Court of Washington to appoint commissioners to ascertain the compensation which the defendants ought to pay the plaintiff for such part of said tenement as was necessary for the use of defendants, and also the damages which would result to the residue of the tract : that commissioners were properly appointed, and met on the said tenement, and ascertained the amount which was a just compensation for the land to be taken by defendants, and also the damages, and reported the same to said County Court, and thereupon the defendants paid the said sum into said court, for the plaintiff's use ; and so they were well justified in constructing said railroad through said tenement, and running their engines and cars thereupon, and in so doing the said cattle of plaintiff were killed without the neglect or default of the defendants." To the reception of their special plea the plaintiff objected.

J. A. and J. T. Campbell, for the plaintiff, insisted that the plea lacked an essential ingredient : the *confirmation* of the commissioners' report by the County Court. They referred to Sec. 11, Chap. 56, page 294 of the Code, as shewing that the report must be "confirmed and recorded" to give it validity, and vest the title of the land in the Company. They also contended that the plea was too broad, in that it justified the *use* as well as the *construction* of the road. They insisted that even if the Company had a right to enter, and construct their work before confirmation of the report, still the *title* did not vest in them, and therefore they had no right to *use* the road : and that the right of *user* must be suspended until the title of the defendants should be consummated. Until such consummation the use of the road was unlawful ; and as the plaintiffs property was destroyed by the *use* and not by the construction of the work, the plea afforded no defence.

Walter Preston and Sheffey, for the defendants, insisted that the Company had done all that was incumbent upon them when they procured the appointment of the commissioners, and a valuation of the property, and paid the amount of such valuation and the damages into the court. Upon such payment "the statute vests in the Company a fee simple estate in the lands, taken for their *use*. If confirmation be necessary, it is as much the duty of the land-owner as of the Company, to cause the report to be confirmed and recorded. The 12th sec-

tion of the Act in the Code provides for cases in which the report is unreasonably delayed, or good cause be shewn against it: and the 13th section authorizes the Company, notwithstanding such delay, or such good cause shewn, to enter into the land and construct their work, *on paying into court the sum ascertained by the previous report*: and this they may do although litigation be pending as to the amount of damages. On the other point they contended that the right to use the road was necessarily to be inferred from the power to construct it. It would be useless to enable them to make the road, pending a decision of the question of damages, and yet debar them from its use till that question be settled.

FULKERSON, J. I have heretofore decided, and am still of opinion, that a railroad company is under no obligation to enclose its line of works; and that in this respect it occupies the position only of an ordinary land-holder. If, therefore, the stock of a coterminous land-holder goes upon the railway and is killed without the negligence or default of the Company, the owner must bear the loss. This conclusion, however, rests upon the supposition that the Company is entitled to possession of the line of its track: that in using its road, it is not guilty of a trespass upon the land which sustains the road. If it be so trespassing—if it be using land to which it has no title—if it has undertaken to construct and use the road without complying with the necessary legal preliminaries, then the Company must make good any injury resulting from such conduct on its part. And the plaintiff contends that in this case the defendant company falls within this category. He insists that they have entered upon his premises without lawful authority: that they have built and used their road in disregard of his rights: in short, that they are trespassers whenever they run a train through his farm: that as they killed his cattle in so running through his property, they must compensate him for the loss resulting from this trespass upon his land. The *gravamen* of his complaint is, that their entry and subsequent use of the railway are both illegal, or at the least that the latter is so, and that he is not to bear the consequences of that illegality. Is this pretension well founded. The answer depends upon the construction of the statutes authorizing the defendants to appropriate lands to their use.

Chapter 56 of the Code points out the manner in which a company may acquire the real estate necessary for their purposes. The sections prior to the 11th indicate the mode in which commissioners may be appointed, and the manner in which they shall discharge their duties: and the 11th is the first section

which speaks of the *effect* of their action. That section directs the report of the commissioners to be forthwith returned to the court. Now on this objection to this plea it must be taken as admitted that, up to the return of the report in regard to the plaintiff's land, everything was regular. It is so averred in the plea, which for the purposes now in hand must be accepted as true. The plea also alleges that the sum reported as a just compensation to the plaintiff was paid into court, which payment is authorized and made sufficient by the 11th section. But here arises the difficulty upon which the plaintiff's first objection is founded. The 11th section, after directing the report to be forthwith returned to the court, proceeds in these words: "and unless good cause be shewn against the report, the same shall be confirmed and recorded." The plaintiff insists that the report is inoperative until confirmed; that it is the action of the court which gives efficiency to the proceedings of the commissioners; and that until their action has been consummated by the judgment of the court, the Company has no right to enter upon his land. The plea does not set forth that the report has ever been confirmed.

I cannot hold that a confirmation of the report is necessary to give the Company power to enter upon the land and construct their work. The object of the Legislature was to screen the Company from the evils growing out of delay occasioned by a protracted contest as to the amount of compensation to which the land-holder might be entitled. It is easily understood that such delay might be detrimental as well to the public as to the Company; and for its prevention an expeditious proceeding has been provided. So soon as commissioners can be appointed and can make the assessment, I conceive that the Company may pay the estimated valuation and enter on the land. The statute says nothing in regard to the time, place or manner of payment. It may be to the party in person, or in court to his use. The provision is simply that "upon such payment" the title shall vest in the Company. I think all that is required of the Company, is to have commissioners appointed; to procure them to act, and to pay the amount assessed by them. I take it that the duty of having their report returned to court, confirmed and recorded, is as much incumbent upon the land-holder as upon the Company. The Company must pay the money before they presume to enter upon the land; but I see nothing to prevent them from paying it on the very day it is assessed, and at once taking possession. This view is fortified by the provisions of the 13th, 14th and 15th sections. The 12th provides for the appointment of new commissioners, for certain reasons: and then the

13th section enacts that upon paying into court the sum ascertained by the *previous report*, the Company may enter into the land and construct their work NOTWITHSTANDING the pendency of proceedings. This I consider conclusive. Its evident purpose is to enable the Company, after having had an assessment made, and having paid the same, to go on with their work: and the succeeding sections provide for all emergencies occurring in subsequent proceedings. It is true, their work may be *suspended* if they do not satisfy any future judgment for enhanced damages; but until such subsequent judgment be pronounced, they are at liberty to proceed.

If I am right in this view, I think it follows that the second point ought also to be decided for the defendants. Though the power to use the road pending a litigation as to compensation is not given in express terms, yet I think it is clearly to be inferred from the power to construct it. The use is the only object of the construction: the latter is only a means to attain the former. I think the two are inseparably connected: and so thinking I must overrule the objection to the plea, and permit it to be filed. Ordered accordingly.

With entire respect for the opinion of Judge FULKERSON, we cannot rid ourselves of a feeling of doubt as to the soundness of his decision of the *second* point involved in the foregoing case; and as the question is one of general and grave interest, we do not feel as if we were using an improper freedom in stating the grounds of that doubt. The number and extent of our public works, and their importance to the community as well as to individuals, justify the expression of all views tending to the formation of correct conclusions upon the subject. We are not prepared fully to coincide in the conclusion, that the right to work and use a railway results, *of necessity*, from the power to construct it; and we are not sure that the distinction between the two capacities, drawn by the plaintiff's counsel in this case, was not well taken.

In the hasty examination, which alone we have been able to give to the question, we have found no case in which the point has been distinctly made. So far as we know, it is presented for the first time in the case from Washington County, above reported. But we find it laid down as a principle of universal application, that the powers of a railroad company are dependent upon statutory grant, whether the statute be embodied in a special act, or in a general law: and their title to land depends on a compliance with the requisitions of the statute. See *Redfield on Railways* page 118. Nor can it be doubted that these powers are to be strictly construed. The compulsory power of

a corporation to take land is in derogation of common right." There is great force in the language of Lord COTTENHAM, cited by Judge Redfield in a note to page 120 of his work on Railways. "The powers given to these companies are so large, and frequently so injurious to the interests of individuals, that I think it is the duty of every court, to keep them most strictly within those powers, and if there is any reasonable doubt as to the extent of those powers, they must go elsewhere and get enlarged powers, but they will get none from me, by way of construction of the act." This view sustains, as we think, the proposition, that in a contest between the Company and the citizen, involving the exercise of compulsory powers, every doubt should operate in favor of the individual, and the corporation should be required to shew that the act done by them is expressly within the scope of their statutory powers.

The right of a corporation, in Virginia, to take lands for its corporate purposes, depends upon chapter 56 of the Code; and upon a careful examination of that chapter, it will be found to relate exclusively to the acquisition of lands for the *construction* of their works. The *use* of the work, and the receipt of profits, are regulated by other provisions. That chapter does not allude to the use of the work when completed. It is true that chapter does vest in the Company a fee simple estate in the land, upon compliance with its provisions; and if that title *has become vested*, of course the Company may use their work for its legitimate purposes. Nor can it be denied that those provisions authorize the Company upon paying the amount once ascertained, whether correctly ascertained or not, to enter upon the lands and construct the work? And such entry may be made, and such construction perfected, even though good cause may have been shown against the assessment, and litigation may be then pending to correct the assessment. It cannot be doubted that if the assessment be proper, and the land-holder satisfied, an absolute title vests in the Company upon payment of the compensation. But such title does *not* vest merely upon such payment, in case the assessment be improper and irregular. It is true that such a conclusion might be drawn from the language of the 11th section alone, for that language is very broad. "Upon such payment, the title to that part of the land, for which such compensation is allowed, shall be absolutely vested in the Company in fee simple." But this language must be read in connection with that of the 15th section, and those which intervene between it and the 11th. By so doing we perceive that the terms of the 11th section are to be restricted to a single case—that of an assessment *with which both parties are satisfied*. The 15th section points out another contingency in

which the title shall vest in the Company; and that contingency is altogether different from the event contemplated in the 11th section. By the provisions of the 15th section the Company cannot acquire an absolute title till it has complied with the requirements of that and the preceding section. Those two point out the course to be taken when cause is shewn against the first report, and there is or may be a dispute in reference to the prior assessment: and it is not *until* the company has taken that course, and made the subsequent payments that may be required, that it is invested with the title. Thus we perceive that the general language of the 11th section is subject to a restriction, which, in a particular emergency, deprives it of all force; and that the title does *not* vest in the Company so long as there is a contest as to the compensation to be paid to the landholder.

At the same time that the title is thus detained from the Company, their power to go upon the land and build their road is clear. The right of construction does not depend upon the title: but can the same thing be said in regard to the right to use and work the road after it shall be built? This is the question presented by the second objection to the plea in the case decided by Judge FULKERSON. Does such a conclusion result from the language of the statute? We cannot perceive it. As we have said, the statute under consideration, in our view, looks only to the construction of the work. Is such a conclusion necessary in regard to public policy? We cannot adopt that opinion. All can perceive that a Company ought not to be restrained from prosecuting the work while a contest as to compensation may be pending; but there is certainly time and opportunity sufficient to adjust such a matter while the work is in process of construction. The proceeding is a simple and expeditious one, and is open to both parties. It is the *laches* of the Company if they neglect to take the steps necessary to vest title in themselves. The report is to be, "forthwith returned to the Court." The Company can immediately move for a confirmation of the report. If confirmed, the land is the company's; if rejected they can at once have a new commission. And with proper deference to the opinion of the Court, we are inclined to think that it is the duty of the Company, rather than of the landholder, to procure the confirmation of the report, or the taking of subsequent proceedings. The Company is the *actor* in the premises: the initiative lies upon it: and after causing an assessment to be made, and taking possession of the land, it is not unreasonable to require them to go on and complete their title. In the case reported it will be seen that the plea did not even allege that any motion had been made for

a confirmation of the report, or anything at all done towards consummation of the title.

As we have said, we find no case in which such a question has been decided in terms; but the case of *Bloodgood v. Mohawk & Hudson R. R. Co.*, found in 2d American Railway Cases, 415, contains some expressions, tending strongly to support the distinction between the *power of construction* and the subsequent *right of user*. That was an action against the Railroad Company for entering upon the plaintiff's land and surveying the same prior to the commencement of their work. Their right to make such entry was affirmed by the Supreme Court of New York, under the terms of their statute; but after affirming such right, SUTHERLAND, J. (who pronounced the Court's opinion,) says, at page 420: "If, notwithstanding their original entry was lawful, the defendants have been guilty of *such delay in taking the measures prescribed by the act*, to obtain a title to the land, and *to ascertain and pay the plaintiff's damages*, as to deprive them of the benefit of such entry, and render them trespassers *ab initio*, it was incumbent upon the plaintiff to have replied the facts necessary to present that question. Whether an unreasonable delay in paying the plaintiff's damages would render the defendants trespassers *av initio*, it is not now necessary to consider; that question is not presented by the reco.d. That the plaintiff would have an ample remedy *in such case*, in some form of action, *there can be no question*." (The *italics* are our own.) We think this goes strongly to support the view that the original entry into the lands may be lawful, yet their subsequent use be illegal.

We do not pretend to express a decided opinion on this question: Judge FULKERSON may be right, and we do not choose to set up our judgment against his; we mean only to intimate that the question is one of difficulty: that the point is an important one in its practical bearing; that there is room for much difference of opinion; and, that while the right to construct the road depends upon *payment of the assessed compensation* only, the right to work, use and enjoy that road, depends upon *consummation of the title to the land*.

Dobyns & Fariss v. White and others.

Circuit Court of Carroll County, Va. August Term, 1859.

An absolute release or discharge of one joint obligor is a discharge to his co-obligors.

One surety of a constable petitions the Court to require the officer to give a new bond, and the Court makes the order accordingly: but the clerk, instead of taking a new bond, with the assent of the officer *erases* the name of the petitioning surety, and allows other names to be added. This destroys the bond as to all the original sureties.

At the July term, 1852, of the County Court of Carroll, *David White* qualified as a constable of that county, and executed his official bond in proper form, with *Wm. White, John Tyston*, and *Edmund Chitwood* as his sureties. In March, 1853, *Tyston* died, and at the April Term of the County Court, 1853, his administrator presented a petition to the Court, praying that *David White* might be required to give a new bond. The Court made an order to that effect, and the clerk was directed to take a new bond. Instead of doing so, by an arrangement with *D. White*, and in his presence and at his request, the clerk *erased* the name of *John Tyston* in the body of the bond, and also obliterated his signature and seal. The constable then tendered three other persons, (all of whom afterwards proved to be insolvent,) as additional sureties. There was not room on the bond for the signatures of these parties; and the clerk attached a strip of paper to the bond with wafers, and these new sureties put their signatures on that bit of paper, immediately under the names of the original obligors, and he also inserted the new names in the obligatory part of the bond. The record of the County Court states: "And thereupon the said *David White* executed a new bond, with sureties, which was approved by the Court." All these proceedings took place without the knowledge or consent of *Chitwood* and *William White*, the surviving original sureties, who had nothing to do with the proceeding against the officer; and neither of them ever saw or acknowledged the bond in its changed condition.

In 1857, the plaintiffs, *Dobyns & Fariss*, gave notice to *David White, William White* and *Chitwood*, that they would move the County Court for judgment against them for several sums of money, amounting to nearly \$400—for money collected by *D. White* as constable, with damages, according to law. The case was removed by consent into the Circuit Court, and the facts were agreed: it appearing that *D. White* had collected

and misapplied the money of the plaintiffs during his continuance in office, but *after* the alteration of the bond, and that he was insolvent.

Poage & Walker for the plaintiffs.

Cook for defendants *Chitwood* and *Wm. White*, relied on *Blow v. Maynard*, 2nd Leigh, 29; opinion of TUCKER, J. in *Tremper v. Hemphill*, 8th Leigh, at page 626; opinion of MARSHALL, C. J. in *Garnett v. Macon*, 6th Call., at pages 341 and 343.

FULTON, J.

I do not think it admits of any doubt that the absolute and unconditional release or discharge of one joint obligor, or of one obligor in a joint and several obligations, is a release to all his co-obligors. In this case the obligation of *John Tyston* was intended to be, and was actually destroyed. As to him, (or rather as to his representative,) the bond was destroyed to all intents and purposes. It is not pretended that any claim can be enforced as against his estate. And such being the case, I think the authorities are conclusive to the effect that the bond is now void as against the other sureties. It has been treated as the existing obligation of the officer and his two surviving sureties: no motion is made as against the supposed new sureties, and none could be made; for they are not at all bound. Nor can those two sureties be bound. They sealed an obligation with *John Tyston*: that paper had been destroyed so far as *Tyston* was concerned; and that being done without their consent, the paper is void as to to them also. They have never since acknowledged it as their deed, and cannot be held bound by it.

It may be said that the record of the Court shews that a new bond was taken. So it does; but where is that new bond? Surely it cannot be this mutilated, altered document, which is the deed of no one but *David White*. Let that new bond be procured, and we will then see what it is worth. *This* is a mere nullity.

That there has been gross misconduct or carelessness some where, is plain. The plaintiffs have lost their debts through the misbehaviour of either the County Court or its clerk. But that cannot affect the question here. As against the constable himself, the plaintiffs are entitled to judgment, for no bond was necessary to render him liable: but the responsibility of the sureties depends upon the bond, and that having been made void, they must go quit of this demand and recover their costs.

Judgment accordingly.

Ogle v. Commonwealth.

Circuit Court of Carroll County, Va. August Term, 1859.

The foreman of a Grand Jury fails to sign the endorsement on the back of an indictment: it is void, and ought to be quashed.

A Grand Jury was empannelled in the County Court of Carroll County, at the June term, 1859, and returned an indictment against *John Ogle* for a misdemeanor. The defendant was summoned to appear at August term, and did so, and moved the Court to quash the indictment, on the ground that it was not endorsed by the foreman of the Grand Jury. On inspection of the paper produced as the indictment, it was endorsed—"A true bill, ——— Foreman." On the *inside* of the paper the name of "*Michael Kinzer*" was written at the foot of the indictment, and the record of the Court shewed that said *Kinzer* was foreman of the Grand Jury, and that the said Grand Jury had returned an indictment against the defendant. A number of other indictments were found by the same Grand Jury, and they were all open to the same objection. The County Court *refused* to quash the indictment, and the defendant appealed to the Circuit Court. The case now came on to be heard.

Tyston, Cook and McComant, for the appellant.
Hill, Commonwealth's Attorney.

FULTON, J.

There is a line of decisions in our reports of criminal and misdemeanor cases which, in my opinion, put an end to any question on this cause. *Cawood's Case*, 2nd Va. Cases, 541; *Snyder's Case*, 2nd Leigh, 744, *Drake & Cochran's Case*, 6th Grat. 668, and *McKinney's Case*, 8th Grat. 589, are, as I consider, conclusive of this appeal. Those cases establish that an indictment must be endorsed "a true bill;" that such endorsement must be signed by the foreman, and that the finding and endorsement must be recorded in the Court. In this case there was a finding, an endorsement and a recording, but no signature by the foreman. *Non constat*, therefore, that this is the paper which the Grand Jury returned into the Court, "endorsed a true bill." There may have been some other paper really returned by the grand inquest, but this cannot be taken as their act. The endorsement of the foreman is necessary to identify the paper on which the Grand Jury acted. The County Court

ought to have quashed this indictment, and I must, therefore, reverse their judgment; and proceed to give such judgment as that Court ought to have rendered. Therefore,

Judgment of County Court reversed, and indictment quashed.

PENNSYLVANIA CASES.

Searle v. Lackawana and Baltimore Railroad Company.

MEASURE OF DAMAGES—VALUE OF COAL LAND.

Error to Luzerne County Common Pleas.

The opinion of the court was delivered by

LOWRIE, C. J.—This case is very defectively presented in the plaintiff's paper book, for it gives us no part of the evidence on which the cause was tried, and does not enable us to consider the rejected offers in their regular connection, or to compare the charge with the case before the court. We could not, therefore, consider the plaintiff's assignments of error here were it not that his defects are supplied by the defendants' paper book.

The claim is for damages for taking part of the plaintiff's land in making the defendants' road, and by the principles of the judge's charge the jury were allowed to find a verdict for the value of the land taken, and for all the actual damages arising from the manner in which the road went through the plaintiff's land and affected his improvements, and to measure even imaginary and contingent damages against the probable advantages or facilities that the improvement might occasion. We cannot say that we discover any error in all this.

But the court rejected evidence that there was over an acre of coal under the road, worth \$4000, which would be lost to the plaintiff, because necessary to be left for the support of the road.

Now if such a fact were necessary to the ascertainment of the value of the land below, it would be wise to accept the testimony of experts, for we ought always to seek the best sources of information. The objection is not to the experts, but to the facts themselves. We do not measure the value of land by such facts. Land may have 4000 dollars' worth of coal per acre in it, and yet sell at \$40 per acre.

When a man has to sell his property, of course he must take the market for it. That is, measured by the custom or common dealings of the country. If it is land, the market value is measured by the price usually given for such land in that neighborhood, making due allowance for differences of position, soil, and improvement. Value may be very approximately estimated in that way, for it is not then founded on the mere opinion of witnesses, but on the fact of a general market value.

When the State takes private property for public uses, or authorizes it to be taken, this market value is all that it pays for it. This is the necessary measure, in order to avoid the favoriteism or oppression that would attend any other measure. Every man holds his property subject to this eminent domain, dominion or ownership of the whole society. He must give it up when society needs it, on being paid its value according to the estimate put upon it in the market by common consent.

On the subject of taking land for public uses, the French have a very carefully prepared system in their law of 8th of March, 1810, *sur les expropriations cause d'utilité publique*, and it directs the market value to be ascertained by reference to recent actual sales in the neighborhood, by the tax books, and other documents, with the aid, if necessary, of experts, or persons whose business it is to deal in such values. Art. 16, 17.

In the present case, the jury were permitted to find in favor of the plaintiff the full value of the land, as coal land, though the defendant got no title to the coal, further than it is needed to support the surface. Then the plaintiff has been allowed the full value of the land, as estimated by the common standard, and we do not see how we can take any other. The one here proposed has never been publicly sanctioned, and that is something against it. It would require us to ascertain the possible value of the products of the land in order to get at the value of the land itself. But the products do not exist, and therefore, have no value, for value here means value in money in the market, and this cannot apply to products not yet in existence. And then to use the products as a standard of value of the land, is to apply an uncertain measure in order to obtain a certain result. It is easier to value the land directly than this.

Moreover, the offer impliedly requires a degree of refinement in the measure of values which seems to us totally incompatible with the gross estimates of common life. Though we might have the most accurate calculation of the quantity of coal in the land, yet without knowing exactly the expense of bringing it to the surface and carrying it to market, and the amount likely to be lost in mining and conveying, and the times in which it would be brought out, and the market prices at those

times, the quantity would not help us to value the land. The gross estimates of common life are all that courts and juries have skill enough to use as a measure of value, all other measures are necessarily arbitrary and fanciful.

There was another offer to show that the railroad of the defendants' crosses the land in such place and manner as to materially increase the expense of mining the coal in the land.

We understand from the opinion of the court below, that this means that if at any future time the plaintiff shall undertake to mine the coal in his land, he will be put to great expense in getting it across the road for transportation to market, and for this he wants compensation.

There is no special allowance in the Act of Assembly for supposed injuries of this kind, and if the common law does not recognize them as injuries, we do not see how it is possible for the court to allow compensation on account of them. To ascertain the common law, let us see what is the usual mode of proceeding in such cases.

The State allows for all actual damages to existing improvements, especially in case of railroads; and that has been done here. But so far as regards the unopened coal veins on this land, we may treat the case as one of wild lands. Over such the State makes its roads with simple reference to public convenience. It allows no damages on account of the fact that when the owner comes to improve he must go to great expense in adapting his improvements and his roads to the public road. It counts not at all on the minerals under the road; to do so would obstruct all improvements of such land; and yet mineral lands must have roads, as well as other land, and on similar terms.

It cuts through high ground and fills up low, without allowing for the difficulty which the owner may some day have in getting at or over the road. It usually does the same even through improved lands, 8 Watts & S., 85, though it does not always permit railroad companies to do so, 16 State R., 191.

In relation to wild lands such operations are no present injury, except in a partly imaginary sense. They may some day prove an obstruction, and yet it is impossible to tell what changes of roads and other avenues of communications, and what changes in the value of the land and of its products may take place before that day arrives, and it is impossible to decide now what the inquiry would then be, or that it would be any. It may be that before this coal begins to be mined, the surface will be occupied by improvements needing this road, and pre-

senting themselves greater obstructions to mining than the road is, because the mining must regard their safety, 12 Queen's B. N., 739.

We cannot say that we discover any error in the case.
Judgment affirmed and record remitted.

Chandler v. Barrett, Administrator of Glover.

A promise by one who has attained majority to pay as fast as he got able, is no affirmance of his contract made while an infant, and is unavailing without proof of ability.

A promise to affirm such a contract must be made to the party in interest or to his agent.

This case came up on a writ of error to the Common Pleas of Susquehannah county. The opinion of the court was delivered by

STRONG, J.—Admitting that the contract of the infant was not void, but only voidable, and therefore, capable of being ratified, the question presented is whether the plaintiff produced sufficient evidence of ratification to authorize the court to submit the matter to the jury. A single witness testified that after Glover, the infant, attained his majority, he said to the plaintiff, "I will pay you all I owe you, rent and all." The witness added, on cross-examination, "perhaps he did put in that he would pay as fast as he got able. I think this was what he did say." The court below instructed the jury, in effect, that this was not a confirmation of the contract to pay rent, into which Glover had entered, and as the plaintiff offered no evidence of his ability to pay, directed a verdict for the defendant.

Certainly the direction was right. Most of the cases assert that an executory contract of an infant can be ratified only by a distinct promise to discharge its obligations, or by an express agreement to affirm it. A promise to pay as fast as he got able was no affirmance of the contract originally made, for that was a promise to pay absolutely. A promise to pay when able, is perfectly consistent with a refusal to assume an immediate liability. It has repeatedly been decided that such a promise will not overcome the bar of the statute of limitations unless accompanied by proof of ability to pay. *Tompkins v. Brown*, 1 Denio, 247; *Tanner v. Smart*, 6 Barn. & Cress., 603; *Laforge v. Jayne*, 9 Barr, 410. There is even more reason for applying the rule to promises set up in order to validate contracts of infants. The statute of limitations is said to be based upon the presumption

that the debt has been paid. Whereas the voidability of an infant's contracts rests upon a supposed mental incapacity. A conditional promise to pay would seem to repel any presumption that the debt had been paid, but such a promise tends very slightly, if at all, to establish the prior existence of a mind capable of contracting. Accordingly, it has been ruled in New York, in *Evenson v. Carpenter*, that where an infant had given a promissory note, which was only voidable, his promise to pay *as soon as he could*, made after his majority was unavailing without proof of ability. Such is our opinion.

Nor was there error in refusing to admit evidence of what Glover had told a stranger he would do. At most it was but a declaration of intention, not a ratification of the contract. A promise to take a case out of the statute of limitations, or to affirm an infant's contract must be made to the party in interest or to his agents. *Gillingham v. Gillingham*, 5 Har., 302; *Goodsel v. Myres*, 3 Wendell, 479. Declarations to strangers are unavailing.

The Judgment is affirmed.

[The following case is not marked for report in the books.]

Shoffstall vs. Adams.

The statute of frauds is as applicable to transfers of equitable estates in land, as to those of legal interests.

An equitable title to land may be surrendered by parol, though it cannot be created or conveyed in that manner.

ERROR to the Common Pleas of *Crawford county*.

This was an action of ejectment by Jacob Shoffstall against Charles Adams for sixteen acres of land.

A brief statement of the material facts is contained in the opinion of Mr. Justice Strong.

The case tried below, before Derrickson, P. J. Under his instructions a verdict was rendered for plaintiff, to be released on payment of \$87.31 in one year, with interest from date.

Plaintiff sued out writ of error.

Church & Pitts for plff. in error.

Finney & Douglass for deft. in error.

The opinion of the Court was delivered, at Philadelphia, Jan. 3d, 1859, by

STRONG, J.—The argument is, that the defendant's title can only be sustained in violation of the statute of frauds. That statute requires contracts for the sale of land to be in writing, but it fails to designate any written form of a contract. Any note in writing, if signed by the parties, or by the party to be charged, if the other has accepted it, is sufficient. 5 *Watts*, 528; 10 *Watts*, 388. Even a receipt for the purchase money will suffice, if it show the terms of the bargain. The land in controversy here was part of a larger tract which had belonged to John Reynolds. Some time previous to the year 1845, Reynolds contracted to sell the larger tract to D. A. Ferris. While the latter was the owner of the equitable title under his agreement with Reynolds, he sold the eastern half to the defendant. Whether the contract with the defendant was in writing or not does not appear. However that may be, Adams took possession of the land, and from time to time made payments to Reynolds. On the 12th of June, 1847, he made a payment, the receipt of which Reynolds acknowledged in writing in the following words: "Received of Charles Adams eleven dollars and fifty-five cents on account of land contract of D. A. Ferris—a new contract to be made with Adams of one-half when released by Ferris. (Signed,) John Reynolds." Ferris subsequently surrendered his contract with Reynolds. The equitable title to the land was then in Adams by virtue of the written receipt. After the surrender Reynolds contracted, by articles of agreement, to sell the whole tract to David Tingley, with a reservation, "that if Charles Adams, to whom D. A. Ferris sold the eastern half, should pay his equal half part of said contract from the beginning, including what he had paid, then he to have a separate contract for said eastern half part." Upon the back of the articles Tingley endorsed an agreement at a later day, to release sixteen acres from the east side to John Reynolds for the purpose of settling with Charles Adams, and giving to him an opportunity of buying the same from said Reynolds, the said Adams to pay for the same at original price and to be allowed what he had paid. By this reservation and release, the previously acquired rights of Adams were recognized, though it seems to have been supposed that he might be induced to accept sixteen acres in lieu of the eastern half of the whole tract. About the time of this release and subsequently, additional payments were made by Adams to Reynolds, who gave receipts for them, acknowledging that they were made on account of the "land contract," and "land debt." The title of the defendant then does not rest on parol. There is written evidence of it sufficient to take it out of the statute of frauds, and to enable a chancellor to enforce it. There is therefore no just ground of

complaint of the answer of the court to the plaintiff's first point.

The remaining errors assigned, relate to the instructions which the Court gave to the jury, relative to the effect of an alleged purchase by the plaintiff of the defendant's equitable title, before the legal title was conveyed by Reynolds to the plaintiff. They may be considered together. The sum of the instructions was, that the alleged purchase was inoperative, because it was not in writing. It is true that an equitable title to land may be surrendered by parol; though it cannot be created in that manner. A parol agreement may be a sufficient defence to a bill for specific performance, though utterly unavailing as a ground to enforce it. But parol agreement, upon which the plaintiff relies, was not a surrender by Adams of his equity. A surrender to Schoffstall was impossible, because he was not then the owner of the legal title. The transaction was an attempted purchase, and, being in parol, was consequently ineffectual. Nothing is better settled than that equitable estates are within the statute of frauds: 7 Barr, 420; *Murphy v. Hubert*. They are even more than legal estates exposed to the mischiefs which that statute was designed to remedy.

Under the facts of this case, the plaintiff has no reason to complain: He may be thankful that he has been permitted to recover a conditional verdict.

The judgment is affirmed, and the time for the payment of the unpaid purchase money is extended until the first day of April, 1859.

VERMONT CASES.

Supreme Court.

Muggy v. Scott.

This is an action of trespass upon the freehold. The plaintiff owned the premises and the defendant had occupied them, under some contract or permission which had expired. The defendant having no family at the time, was temporarily absent from the house, leaving it fastened, when the plaintiff entered, doing no damage, and put out the plaintiff's goods, without damage to them. The defendant soon after returned, and restored his goods, and continued the possession. The county court held the plaintiff could not maintain the action, his entry being tortious.

But it was held that this decision was erroneous, and that such entry by the plaintiff, he having the right of entry and occupancy, was not a forcible entry, within the meaning of the statute against forcible entry and detainer, and that by such entry, in the absence of defendant, leaving no one in the actual possession of the house, the plaintiff was reinvested with the legal possession of the premises; and that, consequently, the defendant's return, and restoring of his goods to the house, and resuming possession of it, was wrongful, and that he was liable therefor, in this action, as well as for his former wrongful possession, by holding over after his right of occupancy expired.

State v. Denin.

This is an indictment, in the language of the statute, "for setting fire with intent to burn" to a barn, &c. The conviction was had in the court below, upon proof that the prisoner set fire to the hay in the barn, which burned so as to heat the floor in the hay loft, and somewhat discolor it, but not so as to char, or in any manner burn it, when it was discovered and extinguished.

The court held that the proof was sufficient to justify the conviction. Another section of the statute provided for the punishment of the offence of "burning" any building. This section of the statute seems to have been intended by the legislature to provide for the punishment of some lesser or different offence, where the intent was the same, and the act the same, perhaps, but where the consequences were sooner arrested, so that no actual burning of the building or any portion of it occurred.

Root v. Reynolds.

Held, that where the vendor of personal property, liable to be taken upon execution, is in failing circumstances, and desires to dispose of his property to prevent it being levied upon by his creditors, and this is known to the vendee, he may nevertheless purchase the same, if his motive in the purchase is to rid himself of a ruinous competition in business, and in no sense to aid the vendor in his illegal purpose, although he may know that by the purchase he does aid the vendor in effecting an unlawful purpose, prohibited by the statute against fraudulent conveyances, when participated in, both by the vendor and the vendee.

Jesse Cooper, Ex Parte.

POWER OF JUSTICE OF PEACE TO COMMIT FOR CONTEMPT.

In the course of a trial before Thomas Guild, Esq., a justice of the peace for the county of Orleans, the relator, who is an attorney and counsellor, made use of some language, in regard to the conduct and capacity of the magistrate, which the magistrate regarded as a personal insult; whereupon, the court informed Mr. Cooper that he must pay a fine of ten dollars for his contempt, and stand committed till complainant issued his warrant accordingly.

The relator brought the case before the county court, upon *habeas corpus*, and the decision there being against him, he brought the case into this court, upon exceptions.

1. The court held the matter was properly revisable in this court upon exceptions of writ or error.

2. That although this is the first instance known in the State of the exercise, by a justice of peace, of the power to punish, in a summary way, for contempt, there can be no question that the power is incident to all courts of record having common law jurisdiction. If it were not so, the condition of all courts would be truly pitiable, being bound to hold courts and hear cases, and without the power to enforce decent respect to their person or presence, during the conduct of such trials. This is applicable to justices' courts, as much as to any other tribunals. And the power to punish for contempt is incident to courts altogether independent of constitutional or statutory provision.

Held, also, that the judgment of the magistrate in regard to the language used by the relator, being so used in a contemptuous sense, is not revisable in this court. In regard to that question the decision of the magistrate is final.

The argument against the existence of this power, attempted to be drawn from its liability to abuse, is not to be relied upon. There is little danger of the abuse of power in that direction, in this country, and especially in a local magistrate. And if there were more danger than there is, it would not be for this court to afford redress by denying the remedy altogether.

Foster v. Cleveland.

PARENT AND CHILD—NECESSARIES—CONTRACT.

Where the father, (defendant,) contracted with the plaintiff for the hire of his minor son through the season, with leave to furnish his necessary clothing towards his wages; and the plaintiff instead furnished the son money, some portion of which was by the son expended in necessary clothing,

Held, that the defendant is liable only for such portion of the money so furnished as was expended in the purchase of necessary clothing for the son; that the son is not the father's agent for receiving pay for his services, except so far as he is authorized so to do by the father; that he has not the same authority to bind his father for necessities, which he would have to bind himself if acting on his own behalf, inasmuch as in that case the employer might justify paying the son for his services, in such necessities as are suitable to his circumstances and condition; whereas, in this case the father is entitled to be consulted, and to direct what necessities shall be furnished his son on his credit. The authority given, therefore, by the father, must be strictly followed, but the plaintiff may, without any substantial departure from such authority, be regarded as having procured such necessary clothing as was obtained by the son from the money put into his hands by the plaintiff.

*Corbin v. School District in Milton.*CONTRACT—CORRESPONDENCE—DAMAGES FOR BREACH OF CONTRACT
TO EMPLOY.

Where a contract is negotiated by correspondence, the point at which it is closed depends upon the understanding and expectation of the parties, to be gathered from the correspondence and attending circumstances. The contract becomes binding at that point where the minds of the parties meet. An offer may be made, subject to recall at any time before the acceptance is received, but more commonly the offer is made to become binding when accepted by the other party; and offers made in general terms are to be so construed ordinarily, and if accepted and notice given back immediately, the contract thus becomes binding upon both parties, from the moment of acceptance.

A school teacher who is hired to teach for a definite term, and then not allowed to teach, but who holds himself in readiness to perform the contract during the whole term, is not entitled to recover the stipulated wages for the term, but only such damages as he necessarily suffers. He is bound, in good faith, to turn his services to the best account during the term. But if he is unable to find employment, after making proper effort, and in consequence remains out of employment, he is nevertheless entitled to be made whole.

Robinson v. Potter.

STATUTE OF FRAUDS—CONTRACT FOR BENEFIT OF ANOTHER.

In contracts not in writing, although the undertaking is for the benefit of another, and the party may expect and be entitled to indemnity from such other person; still, if such other person be not holden directly to the same party to whom the contract in question is made, and for the same thing, so that the one is collateral to the other, the contract is not within the statute of frauds, but is an independent, original contract between the parties to it, and will stand or fall by its own terms and incidents.

Willey v. Mazham.

ACCORD AND SATISFACTION.

This was an action to recover damages for not being allowed to fulfil a contract of service for three months. The defence urged was, that the plaintiff and defendant had a dispute about the ownership of a horse, and the plaintiff charged the defendant with falsehood, in the presence of one of his apprentices. It appeared that defendant was, in fact, in the right, although the plaintiff believed otherwise at the time he made the charge. The defendant refused longer to employ the plaintiff, he having laboured but nine days towards his three months. The plaintiff subsequently settled with defendant, and received pay for the labour he had performed, making no claim for damages.

Held, that the plaintiff could not recover upon the foregoing facts. It would seem that the excuse for turning the plaintiff away must be regarded as sufficient, under ordinary circum-

stances ; and the settlement and receiving pay for the services performed, without further claim, is the strongest evidence of accord and satisfaction of the entire claim. The plaintiff must have known the defendant would so regard it ; and he is therefore bound by the construction which he expected the defendant to put upon it.

Redway v. Gray.

SLANDER—CHARGES OF FRAUD AND INSOLVENCY.

The true test in regard to what words, imputing crime, are actionable in slander is, that the crime must be infamous, or one involving moral turpitude of a serious character,—such as felony at common law, the *crimen falsi*, and other offences of a similar grade. It is actionable, to charge one with the crime of petit larceny. But to charge one with burning his own buildings to obtain the insurance upon them, although a disgraceful fraud, is not actionable, in slander. Those offences punishable by imprisonment in the State prison are commonly regarded as involving such a degree of infamy, that to charge one with them is actionable slander.

To charge one with insolvency, unless spoken of his trade or business, and especially unless alleged to be false is not actionable in slander, even when special damage is alleged, as that plaintiff was thereby sued for a just debt, and put to cost which he would not otherwise have incurred.—*Law Reporter.*

NEW HAMPSHIRE CASES.

State v. Matthews.

CONTEMPT—ATTACHMENT—PRACTICE IN PROCEEDINGS FOR
CONTEMPT.

The authority to punish contempt is a necessary incident inherent in the organization of all legislative bodies, and all courts of law and equity.

If the contempt be committed in the presence of the court, the offender may be ordered into custody without any warrant or written order ; otherwise, an attachment, the sole object of which is to bring the offender into court, may issue.

An attachment may issue in the first instance, or an order be made for the respondent to appear and show cause why one should not issue.

An attachment may generally be served by taking bail or a bond for the appearance of the respondent; when issued to enforce an appearance or an answer, or for not paying costs or obeying an order or decree, the respondent should be brought into court.

Attachments, to enforce an appearance or answer, should specify, or have endorsed thereon, the name of the suit and the object of the process; those issued for contempt in disobeying an injunction, need contain no such specification or endorsement.

A proceeding for contempt is an independent matter, requiring distinct notices of proceedings to be given; and after an attachment issues, it is regarded as a criminal prosecution.

The respondent may submit his contempt to the court upon his own answer, in the form of an affidavit, or he may demand of the prosecutor to file interrogatories for him to answer. The usual course, where the alleged misconduct is denied, is for the court to allow the prosecutor to file interrogatories in court, or before a master or commissioner, intended to elicit a full statement of the facts and circumstances of the alleged contempt. The respondent's answers to these interrogatories, with such other testimony as the prosecutor and respondent may desire, are taken and reported to the court, who determine from the whole evidence the guilt or innocence of the accused.

Interrogatories may be amended, or additional ones filed, for the purposes of explaining an ambiguity, or eliciting a fuller answer.

The court determines the question of contempt; the respondent is not entitled to a trial by jury.

Somersworth Savings Bank v. Roberts.

MORTGAGES—DEFECTIVE CONDITION—SUFFICIENT CONDITION.

Every conveyance of lands made for the purpose of securing the payment of money or the performance of any other thing in the condition thereof stated, is a mortgage.

If the thing to be performed be so defectively stated in the condition of a conveyance of lands intended as a mortgage, as that the condition is void for uncertainty, the conveyance is in law absolute, at least between the parties and their privies.

A deed of lands containing a condition, that, if the grantor

shall pay to the grantee or his assigns the grantor's note, of even date therewith, payable to the grantee or order, in six months, with interest semi-annually, the same shall be void, is not invalid; nor is it absolute under the provisions of § 2, ch. 131 of the Rev. Sts.; but it is a valid mortgage, although the amount of the note is not specified in the condition, it having been made and delivered to the grantee at the same time with and intended to secure the payment of the grantor's note for the amount of its consideration, correctly described in its condition in all particulars, except the amount thereof.

Bank of Newbury v. Rand et als.

PROMISSORY NOTES DISCOUNTED BY THIRD PERSONS.

When a note is made to raise money, it does not change the liability of the maker that the money is advanced by a third person instead of the payee.

Where the defendants, for the purpose of raising money for the use of a railroad, signed a note payable to a bank, and delivered it to agents to procure it to be discounted, but the bank refusing to advance the money, the agents obtained a larger sum of other persons upon the notes of the corporation and directors, and pledged the note of the defendants, together with the bonds of the corporation, as collateral security, and the money was appropriated for the use of the road—*held*, that the notes of the corporation and directors not being paid, a suit could be maintained upon the note of the defendants, in the name of the bank, for the benefit of those who advanced the money.

Brown v. Brown.

EFFECT OF DISMISSING A LIBEL.

A decree dismissing a libel for divorce upon a hearing on the merits, is a bar to any future libel for the same cause: *aliter* if the libel is dismissed for defect of proper allegations, or for want of prosecution, or on motion of the libellant.

*Goodhue v. Clark and al.*BILL BY EXECUTOR FOR DIRECTION—EVIDENCE TO AID THE
CONSTRUCTION OF A WILL.

An executor may file a bill for direction of the court in executing a will, the construction of which is doubtful.

Proof of the situation and circumstances of a testator and his family, his property and his legatees, and the like, are always admissible to aid in the construction of a will.

*State v. Richardson.*INDICTMENT—RESISTING OFFICER—OWNER OF PERSONAL
PROPERTY.

It is no defence to an indictment for obstructing and resisting an officer, that the officer was attempting to attach personal property of the defendant upon a writ against another person, and the defendant only used such force as was necessary to prevent his accomplishing that purpose.

The owner of personal property is not justified in resisting or obstructing an officer who is attempting, in good faith, to attach it, on process against another individual, which he is known to have in his hands, and to be authorized and qualified to serve.

*Ward v. Howe, Adm'r of Cole.*NOTE GIVEN IN MASSACHUSETTS FOR PRE-EXISTING DEBT—
PRESUMPTION.

The decision in *Ward v. Cole*, 32 N. H. Rep. 452, affirmed.

Where a note is given in Massachusetts to a party residing there, the question whether it was received in payment of a pre-existing debt, is to be decided according to the law as held upon that subject in that State.—*Law Reporter*.

MASSACHUSETTS CASES.

Supreme Court, January, 1859.

Cook v. Cook.

It is waste for a tenant in dower, to whom two distinct parcels of land, with a house on each, are set off for her dower, to take fire-wood from one of the parcels of land for the use of both houses.

Sibley v. Ellis.

Using a way over land with the knowledge of the owner of the land, although commencing in a trespass, and known to be such at the time by the trespasser, is evidence from which the jury may infer a right by presumption, if continued for twenty years without intermission adversely and under a claim of right.

Savage v. Reardon.

On the trial of a bastardy process, the fact that the complainant in the time of her travail charged the respondent with being the father of her child, is admissible in evidence to corroborate her.

Thornton v. Adams.

In an action upon a bond, proof of the bond, without any evidence of the breach, does not make a *prima facie* case.

Veagie v. Holmes.

Where a contract is made for certain work to be done by the plaintiff for the defendant at an agreed price, and the work is only partially done, but is availed of by the defendant, the measure of damages is the contract price less what it will cost the defendant to complete the work according to the contract. And when the jury were simply instructed to find the value of the work actually done, a new trial was ordered.

Preston v. Neale.

PRACTICE—BILL OF PARTICULARS—LIEN.

The want of a bill of particulars of the plaintiff's demand, under a common count, must be taken advantage of by demurrer or motion, before trial, for an order to have the defect supplied; the defendant cannot, at the trial, move to have the count stricken out of the declaration, for this cause.

When a tenant or occupant, on removing from the demised premises, leaves certain chattels behind him, without any agreement with or license of the landlord, the latter is entitled to reasonable compensation for the damage and expense of keeping the chattels, but has no lien therefor, and no right to detain them from the owner after demand, and he will not be entitled to compensation for keeping the chattels after the owner shall have demanded them.

H. D. Hutchinson, for plaintiff.

T. S. Dame, for defendant.

Lee v. Wheeler.

EVIDENCE—SALE.

In an action for goods sold, which were delivered and charged to a third person, the plaintiff's clerk, who made the contract, may be admitted to testify that the goods were delivered on the credit of the defendant, and that he relied on the defendant for payment.

In such action it is competent to show the poverty and bad pecuniary credit of the third person at the time of the sale of the goods.

N. Wood, for plaintiff.

C. Devens, Jr., and *G. F. Hoar*, for defendant.

Commonwealth v. Baldwin.

FORGERY.

To constitute the crime of forgery, the writing must have been made and intended to be received as the handwriting of another person.

Signing a promissory note S. B. & Co., accompanied by representations that such a firm existed, composed of defendant and S., though known by defendant to be false, does not constitute forgery.

S. H. Phillips, (Attorney General,) for the Commonwealth.
H. Chapin and *G. F. Hoar*, for defendant.

White v. Stoddard.

NOTE FALLING DUE AFTER DEATH OF HOLDER AND BEFORE
ADMINISTRATION—DEMAND AND NOTICE.

Where the holder of a note has died, and no executor or administrator has been appointed upon his estate when the note falls due, and the executor or administrator, within a reasonable time after his appointment, demands payment from the maker, and notifies the endorser, the latter will not be discharged.

D. Foster, for plaintiff.

F. H. Dewey and *E. B. Stoddard*, for defendant.

Johnson v. Thaxter.

SERVICE ON ABSENT DEFENDANT.

A judgment on default, where the only service was by leaving a summons at the last and usual place of abode of the defendant, will be reversed for error in fact, if it appears that the defendant, at the time of the service, was absent from the Commonwealth, and had no notice of the suit, and did not return till after judgment, although the summons was left with his wife.

J. A. Andrew, for plaintiff.

N. C. Berry, for defendant.—*Law Reporter.*

TENNESSEE CASES.

In the Supreme Court of the State of Tennessee, at Nashville, December Term, 1858.

Cornelius Farris v. Kirkpatrick's Heirs and Administrator.

Where partners make a settlement under the sanction of an award of referees, and certain conveyances are made in pursuance of such settlement, and it afterwards turns out, upon a second reference, that the partnership dealings and accounts are adjusted in another manner by reason of a mistake in the first reference, but the matter of the division of certain land was not brought before the second reference, equity will enjoin, by perpetual injunction, an action of ejectment brought by one against the other.

The opinion of the court was delivered by

CARUTHERS, J.—Complainant and John Fitzpatrick, defendant's intestate, were partners for several years in a saw and grist mill. In December, 1853, they made an agreement in the settlement of their affairs, which was reduced to writing. After this, in March, 1854, they made a reference to arbitrators of all matters in controversy between them at that time, by whom an award and final settlement was made, which, it is said, was satisfactory, and the parties acquiesced in it. It seems that the difficulty which produced this suit arose out of the construction of the award and settlement, as to their extent and effect.

The settlement of 1853 is signed by the parties and attested by two witnesses, and is thus briefly stated by them: "We find upon a full settlement that Farris is indebted to said firm \$2,802 81, and that Fitzpatrick is not indebted to said firm. Said Fitzpatrick takes the tract of land known as the 'Peter tract,' and another known as the 'Riley tract,' and said Farris is to have the 'Mill Place,' upon paying Fitzpatrick \$1,485 40." Each party took possession accordingly. The deeds for all these lands had been made to Fitzpatrick individually, but it is admitted on all hands that they were paid for out of the firm means, and consequently were partnership property.

It seems that the parties were not satisfied with their settlement of 1853, and in March, 1854, submitted their accounts to four competent friends to review, and finally adjust them. This was done upon a laborious examination, and the result was, as stated in writing, that Farris, instead of being indebted to the firm \$2,802, as supposed in their previous settlement, only owed it \$12 62, which was then paid. Upon this award the parties say in writing, on the same day, "We, the undersigned,

agree to the settlement, of which the within is a condensed statement, as a final conclusion of our old partnership. March 8, 1854."

It is proved that the matter of the division of the land was not brought before these referees, as that was not understood to be in question, having been previously divided by the parties; but only their accounts were in dispute. There can be no doubt but that such was the understanding of the parties; that they were content with the division they had made, but only differed about their partnership dealings and accounts, which alone were submitted to the arbitrators.

Very soon after this, Fitzpatrick instituted his action of ejectment against Farris upon his legal title. To perpetually enjoin that action, and compel Fitzpatrick to make him a title under their agreement in writing of December, 1853, as to the division of their partnership lands, this bill was filed.

Can the object and prayer of this bill, upon the facts we have stated, be resisted? The Chancellor thought not, and so do we.

The objections of the defendant are all untenable.

1. The argument is unsound, that under the statute of frauds, as expressed in the case of *Shield v. Stamps*, 2 Sneed, 272, and the authorities there cited, in relation to the necessity of setting forth in the writing the particulars of the contract, would render this writing void. This doctrine does not apply to a case like this. There the lands belonged to the parties as a firm, and were well described in the deeds, and nothing more was required in a division between themselves, but to designate the tracts assigned to each by such terms as would be well understood, or the general application by which they were known. The "Peter tract," the "Riley tract," and the "Mill tract," were sufficient. If any uncertainty or ambiguity existed, it could only be explained by parol.

If there were two mill tracts, proof would be required to ascertain which was meant. But here there was but one "mill tract" owned by the firm, and there is no uncertainty.

2. The \$1,480 to be paid by Farris was no part of the consideration, nor a condition to the transfer of that tract. It is manifest from the circumstances, that the division of the lands had no connection with that matter. By the mistake of the parties, it was then supposed that Farris was indebted to the firm \$2,800, to the half of which Fitzpatrick was entitled, and that was stated in connection with the partition of their lands, and it may be that the latter intended in this way to secure a lien upon half of the land assigned to the former for its payment; and that would be unobjectionable if such was the

object, and it was properly done. But then it turned out afterwards, by the award of arbitrators, that this was all a mistake, and nothing at all was due from Farris to his partner. This certainly removed all difficulty on that point, and left the title to the mill tract unencumbered under the previous agreement.

It appears that Fitzpatrick was a professional man of information and experience, and his partner a laborious, uninformed man. They were unequal in this respect, and it is not surprising that such mistakes as might occur in the case would most probably be against Farris. This may account for the very great difference in the result when their complicated accounts were placed in the hands of competent men for adjustment.

We think justice has been done by the Chancellor, and affirm his decree making the injunction perpetual, and vesting the title to the mill tract in Farris.

Benjamin Barnes v. Andrew Gregory.

1. The power of the Court of Equity to reform deeds in cases of fraud, is constantly exercised, and cannot now be questioned.
2. Where the proof leaves no doubt that the sale of land was by the acre, and not in gross, and was so understood by both parties, and the vendee receives more land than he pays for, the vendor can compel payment for the whole quantity sold.

CARUTHERS, J.—The complainant sold to the defendant a small tract of land on Stone's river, in Davidson county. The deed gives a description of the land, and states that it contains "thirty acres, more or less," and the consideration \$1,000.

This bill is filed to correct a mistake as to the quantity of land to the extent of fifteen acres, and claiming \$35 per acre for the same. It is charged that the sale was by the acre, and the quantity to be ascertained by a survey; that before the execution of the deed the survey was made by one Hamilton, and the quantity ascertained, and concealed from him, and his deed obtained, and notes executed for thirty acres instead of the true quantity of forty-five acres.

The defendant denies that the sale was by the acre, but insists that it was in gross; that he was to give \$1,050 for the tract; that he was by the contract to have it, as containing thirty acres, whether it were more or less than the quantity. He relies upon his deed as written evidence of the contract, which cannot be changed by parol.

The proof leaves no doubt upon the mind as to the contract having been a sale by the acre, and not in gross. It is clearly established that it was so understood by both parties, both by their actions and declarations, though the defendant sometimes denied it. The fact that a survey was to be made before the execution of the last note, for the consideration and the deed, is almost conclusive of that fact. It is entirely so, when combined with the declarations of both parties at, before, and after that time.

The testimony also raises as strong presumption, that the defendant knew of the excess before the writings were drawn and signed, and concealed it from complainant. The facts are, the survey was made by Hamilton on the day agreed upon, but the calculation was not made on that day, but was to be made out that night, and on the next day the parties were to meet at the house of complainant, and execute the writings, the contract still resting in parol. The surveyor and the defendant went and staid together at the house of a neighbor, and returned next day, about dinner time, with the deed and notes, and being in a great hurry, procured it to be signed by the complainant, delivered his notes, and went off. At the time of signing the deed, complainant inquired whether the survey made out more or less than thirty acres, and referred to the contract, that whether more or less, the price agreed upon was \$35 per acre. The defendant asserted that he did not know how much there was, but he was to pay \$1,050 for the tract, or \$35 per acre for thirty acres, without regard to the actual number. So, after a short conversation, he went off in haste, having, as he said, urgent business, of an official character, to attend to at home, carrying the deed with him. It is impossible for the mind to doubt from these facts, that he and Hamilton had made a calculation upon the filled notes that night, at least so far as to be convinced that the tract exceeded thirty acres, and that this fact was purposely concealed from the complainant. It appears that the complainant was weak and sickly, and about sixty years of age. It may be, that Gregory said what was literally true, when he asserted that he had not made an accurate calculation of the quantity, and that he did not know the exact quantity. But that he did know there were more than thirty acres, there can be no question. He should have stated this fact to complainant, and not suppressed it, when inquired of on that point, and more especially as he was with the surveyor acting for both parties.

But still it is contended that the deed must be taken as containing the true and full contract, and that no parol testimony can be heard to change or reform it.

That such is the general rule, both at law and equity, no one will be heard to question. But it is just as unquestionable that this may be done where clear proof is made of fraud, or mistake. Both positions are too familiar to permit a reference to authorities.

The power of a Court of Equity to reform deeds in case of fraud or mistake, was exercised by this court in *Williams v. Conrad*, 11 Humph. 415; 8 Humph. 230, and 1 Id., 433. The authorities are all collected in White and Tudor's Lead. Ca. vol. 2, pt. 1, 558 to 596.

But in this case, perhaps it is unnecessary to resort to the doctrine of *reforming* deeds, by the proof of mistake or fraud. The deed, perhaps, gives the boundaries correctly, according to the survey, and needs no change, but the statement of the quantity of land contained in those limits is inaccurate, and so is the amount of the consideration. That the consideration stated in a deed is only *prima facie*, and may be controverted by parol, has been often held. This deed is silent as to the disputed question, whether the sale was by the acre or in gross. To establish the former, and obtain pay for the *whole* quantity sold is the object of the bill. This fact may be made out by parol or extrinsic written evidence. At the last term in Knoxville, in the case of *Bentley v. Miller and Wife*, not yet reported, we gave relief to the purchaser, Bentley, upon the ground that the sale was by the acre, as proved by extrinsic evidence, where the deed was like the present, because of a deficiency of acres. Such is the uniform course of decision, where there is a substantial deficiency, and the contract by the acre, or even in gross when there is fraud or imposition. Not so where the contract is fair, and the sale is by the tract upon the judgment of the parties. The same rule must apply under the same circumstances, in favor of the vendor, where there is an excess for which, by mistake or fraud, he received no compensation, or has been deprived of the benefit of his contract of sale by the acre. *Horn v. Denton*, 2 Sneed, 125.

The complainant, then, is entitled to relief upon the grounds of his actual contract, the mistake in the settlement, carried into the writings executed, and for the fraud of the defendant.

The decree of the Chancellor will be affirmed with costs, and the cause remanded for further proceedings upon his decree, which is in all things correct.

NEW YORK CASES.

Everett, et al., v. Vendryes.

Court of Appeals.

In an action upon a bill of exchange, payable in this State, but drawn and indorsed in a foreign country, the law of this State controls the interpretation and validity of the indorsement, as between the indorsee and the drawer.

Held, therefore, that the indorsee of a bill drawn, and indorsed in New Grenada, upon a party resident in this State, could recover against the drawer on non-acceptance, the indorsement to him being valid according to our law, but not transferring the title to the bill under the law of New Grenada.

As between the indorser and indorsee, it seems the rule would be otherwise, and the law of the country where the indorsement was made would control.

Erben v. Lorillard.

The plaintiff aided the defendant in negotiating the purchase of land, under a parol agreement that he should be compensated for his services by a permanent lease of the land, at an annual rent of 8 per cent. upon the purchase price: *Held*, that this agreement being void, the value of the lease could not be shown for the purpose of proving the value of the plaintiff's services.

The dictum to the contrary in *King v. Brown*, 2 Hill, 485, disapproved.

Such evidence having been received under exception, if it may have affected the verdict, the error is not cured by the judge directing the jury to disregard it, and the defendant is entitled to a new trial.

A declaration of the plaintiff, in respect to the agreement for his compensation, made to the vendor of the land while negotiating the purchase, is not admissible in evidence as a part of the *res gestæ* or otherwise.—*Legal Intelligencer*.

CONNECTICUT CASES.

Supreme Court of Connecticut.

*Bank of Hartford County vs. Nathan M. Waterman.***SHERIFF—FALSE RETURN—ACTUAL DAMAGE—RIGHT OF ACTION
WHEN ACCRUING—STATUTE OF LIMITATIONS.**

An officer who had undertaken to attach real estate on mesne process, made return that he had attached a certain piece of land belonging to the defendant, and had left with the town clerk a true and attested copy of the writ, and of his endorsement thereon. He had in fact left with the town clerk a copy of the writ, with an endorsement thereon that he had attached a different piece of land from the one described in his return. Both pieces belonged to the defendant, and either would have been sufficient to satisfy the claim. The error was not discovered until the plaintiff in the suit had obtained judgment and taken out execution, at which time more than two years had elapsed, both from the date of the levy and from that of the return. The debtor in the mean time had failed and no property could be found on which to levy the execution. In an action on the case for the default, to which the statute of limitations was pleaded, it was held, that the cause of action did not accrue, either at the time of the service of the writ or at that of the false return, and not until, by the failure to obtain satisfaction of the execution, the plaintiff had sustained actual damage. [Ellsworth, J., dissenting.]

The injurious consequences in such a case are not mere aggravating circumstances enhancing a legal injury already inflicted, nor the mere development of such injury, but an indispensable element of the injury itself.

When an injury, however slight, is complete as a legal injury at the time of the act, the period of limitation at once commences; but when the act is not legally injurious until certain consequences occur, the period takes date from the consequential injury.

A neglect to serve mesne process, or a false return of such process, is not in itself a legal injury.

The distinction sometimes made on this subject between the case of mesne process and that of final process, is one rather of practice than of principle, actual damage being essential to a right of action in both cases, and the only difference being that in the latter case damage is presumed, but may be disproved, while in the former case it must be proved.

A distinction is to be made, in relation to the right of action resulting between breaches of public duty, and breaches of private duty or of contract. In the case of a public duty there is no direct relation between the public officer and the party in whose behalf the duty is to be performed, and the breach becomes a ground of action in favor of the individual only when damage results to him in consequence.

Ignorance of a right will not suspend the operation of the statute of limitations against such right.

A party cannot be debarred by an equitable estoppel from availing himself in a court of law of the statute of limitations.—*Law Reporter.*

RECENT ENGLISH CASES.

Rand v. Mann.

[Common Pleas.]

MECHANIC'S LIEN—NEW ERECTION.

The opinion of the court was delivered by

ALLISON, J.—The question which is presented for consideration upon the case stated, requires us to decide, whether a building erected as a back building, (a bath house and kitchen,) and connected with the old structure to which it is but an addition, is subject to mechanic's lien. Were it not for the case of *Nelson v. Campbell*, 4 Casey, 156, we would have no difficulty in entering judgment for the defendant; but the opinion of the court in that case seems to be placed upon the ground, that *every building* is chargeable with liens for work done and materials furnished in its erection and construction, and that under a claim filed against a subordinate structure, the main building and ground appurtenant may be sold. We do not know exactly upon what ground the District Court rested their decision in *Nelson v. Campbell*; but in this court liens filed against the same properties was sustained, for the reason, that each structure, one fronting on Broad street, and one upon Callowhill street, although connected with the main building, first erected, were in effect separate and independent structures; were capable of being used and enjoyed without reference to the old or corner property; and that each could have, without interfering ma-

terially with the latter property, a lot or piece of ground appurtenant, set apart for its separate use. That was an entirely different question from the one before us, and which we may infer was in the mind of the District Court, and so regarded by them; and as the decision in that case was affirmed, we prefer to stand by the law as it has, we think, always heretofore been understood, that the addition of a back building to a main structure was not within the meaning and intent of the mechanic's lien law, and therefore enter judgment for the defendant.

H. T. King for plaintiff—R. Ludlow for defendant.

Reg. v. Keeves.—July 19.

[Essex Summer Assizes.]

LARCENY—20 AND 21 VICT., c. 54, s. 4.

Larceny.—The prosecutor deposed that, being somewhat tipsy, he lay on the ground, partly asleep, and while in that state saw the prisoner take his watch out of his pocket, which he took no steps to prevent, believing that the prisoner, with whom he had been acquainted for some time, was acting solely from friendly motives. Some days after he claimed his watch from the prisoner, who denied having had it; but other witnesses deposed that he had in the meantime offered it for sale.

F. Robinson, for the prisoner, objected that there was no trespass, and consequently no larceny.

CROWDER, J.—This evidence would not support a charge of larceny at common law, but the recent statute, 20 and 21 Vict., c. 54, s. 4, enacts, that “if any person, being a bailee of any property, shall fraudulently take or convert the same to his own use, or to the use of any person other than the owner thereof, although he shall not break bulk, or otherwise determine the bailment, he shall be guilty of larceny.” Here the evidence discloses a bailment sufficient to bring the case within that statute—i. e. if the jury are satisfied on the facts.

F. Robinson.—The point is quite new.

Verdict, not guilty.

Taylor, for the prosecution.

F. Robinson, for the prisoner.—*London Jurist.*

Wright v. Mills.

Court of Exchequer.

TIME OF JUDICIAL ACTS—FRACTION OF A DAY.

In this case a rule had been obtained to rescind an order of Williams, J., setting aside the judgment as irregular. The defendant had died about half past nine in the morning of the 26th of May, and the judgment had been marked the same day, immediately after the office opened, or about a quarter past eleven.

LUSH, Q. C., showed cause.—The judgment being signed after the death of the defendant is void. For many purposes the law does not recognise the fraction of a day; but the tendency of late years has been to set aside these fictions.

[MARTIN, B.—Does not the case of *R. v. Edwards*, 9 Ex., 82, and in error, *Ib.*, 628, decide the point?]

That was a case of prerogative; an extent takes precedence over any act done on the same day; it is otherwise as to acts between subject and subject. *Crick v. Smith*, 8 Dowl., 337, is in point. He also cited *Shelly's case*, 1 Rep. 93; *Rex v. Earl*, Bulb. 33; *R. v. Crump and Hanbury*, Park. 126; *Clayton's case*, 5 Rep. 1; *Giles v. Grover*, 9 Bing. 156; *Thomas v. Desanges*, 2 B. & Ald. 586.

MALCOMB contra.—As relates to judicial acts, the law does not recognise the fraction of a day. *Reg. v. Edwards*, is precisely in point.

POLLOCK, C. B.—It appears that the defendant in this case died about half past nine on the morning of the 28th of May, before the judgment office was opened. As soon, however, as the office opened, the plaintiff signed judgment. Williams, J., made an order setting aside the judgment; and on the application of Mr. Malcomb we granted a rule to show cause why that order should not be rescinded. Mr. Lush has shown cause, and he contends that the judgment was improperly signed, the defendant being dead at the time. All the authorities on the subject are collected in *Reg. v. Edwards*, 9 Ex. 82, and the decision of this court, which was afterwards confirmed in the Ex. Ch., lays down the rule on which this case must be decided. In that case the question arose on a writ of extent, and the court held (my brother Martin dissenting) that the right of the crown must prevail; and that an act of the crown must prevail, although posterior in point of time to an act done by a subject in an earlier period of the day. That decision was confirmed by the unanimous judgment of the court above; but in the

judgment which was delivered by Coleridge, J., the maxim is not based on the ground that the right of the crown should prevail, but on the broad principle that, whether between the crown and the subject, or between subject and subject, judicial acts must be considered to have taken place at the earliest possible period of the day on which they are done, and take precedence of all other acts which may occur on the same day, though they may precede it in point of time marked by hours and minutes. It was admitted in that case that the court will inquire at what time a party did a particular act, and take notice of the hour of the day; but the rule is laid down otherwise as regards judicial proceedings, in *Shelly's case*, in 1 Rep. 93, a recovery being held good, although the party had died on the morning of the day on which it was suffered. We consider the case of *Reg. v. Edwards* is a direct authority which binds us, and it decides that when a judicial proceeding takes place it must be considered to have occurred at the earliest period of the day. As the signing the judgment in this case was a judicial act, it must be considered to have been done at the earliest period of the day; and, therefore, the death of the party before the office was opened does not invalidate the judgment. Under the old system, a judgment, if signed in term, was dated from the first day of term, and if signed out of term, from the first day of the preceding term, and in such case the death of the party before the judgment was actually signed would not affect it. The Statute of Frauds altered the law in this respect, to prevent lands which had been sold being retrospectively affected by a judgment which had no existence when the sale took place. The Statute of Frauds provides that a judgment shall operate only from the day on which it was signed, and provides that the day on which it is signed shall be marked; but it makes no distinction between the hours of the same day. In the case of *Crick v. Smith*, 8 Dow, a *fieri facias*, issued after the death of the party, was set aside, and we are informed that it was on the authority of that case my brother Williams made the order now in question. It is suggested that such a decision is more consistent with common sense. It is, of course, desirable that the decision of the court should be as consistent as possible with plain common sense; but it is impossible for us to overrule what is the established practice, and what must be taken to be the law of the land as affecting the right of suitors; if the plaintiff satisfied us that by the practice of the courts a judicial act is considered as being done at the earliest moment, and is not affected by anything done in the course of the same day, it is the right of the suitor that we should decide in accordance with the established practice. It may be said that our decision

is founded on what is called a fiction, but the effect of it is to prevent and render unnecessary inquiries as to the exact moment of time at which acts occurred, which would very often be extremely difficult or impossible. The rule is now clear that judicial proceedings shall take precedence, and shall not be defeated by any mere act of the party. It appears to me that this rule must be made absolute, on the ground that the judgment was well signed, the defendant having been alive on the day on which it was signed.

Martin, B.—I am of the same opinion. When the rule was moved for, I thought the case was clearly governed by *Reg. v. Edwards*.

Bramwell, B.—I am of the same opinion. That case must decide; the only principle, however, on which the rule can be supported is, that we must give judicial acts precedence.

Watson, B., concurred.

Rule absolute.—*Lond. Law Times*.

Allen v. Maddock.

A. wrote a paper purporting to be a will, but it was not properly executed. She afterwards made and duly executed a paper purporting to be a codicil "to my last will and testament;" but the codicil did not further describe the paper. *Held*, that parol evidence was admissible to show that the informal paper above mentioned was intended to be referred to as her will.—*Judicial Committee Privy Council*.

Pemberton v. Chapman.

Held, (affirming the judgment of Q. B.,) that payment to a married woman who was appointed executrix, but whose husband afterwards refused his assent to her acting, and who was never confirmed by the Probate Court, by a debtor to the estate, who knew that she was married, but knew nothing of her husband's assent or dissent, was valid. *Exchequer Chamber*.

Tundon v. Jervis.

A sheriff's officer holding a warrant to arrest the plaintiff on execution, went to his house and attempted to enter at an open window; the plaintiff's daughter opposed his entrance, and suc-

ceeded in shutting and locking the window. During the struggle, a pane of glass had been broken, and the officer, putting his head through the broken pane, touched the plaintiff, saying, "you are my prisoner," and considering this to be an arrest, broke open the door, and took the plaintiff. *Held* a good arrest.—*Exchequer Chamber*.

Cuckson v. Stone.

By an agreement between the plaintiff and defendant, the former was to serve the latter for ten years, as a brewer, at weekly wages. The plaintiff had an attack of illness which incapacitated him from work for thirteen weeks, at the end of which time he returned and resumed his work. *Held*, that he could recover his wages for the thirteen weeks.—*Exchequer Chamber*.

Hosmer v. Cornelius.

A person who represents himself, although not fraudulently, as competent to do certain work, and is hired for a time certain to do such work, may be discharged before the end of the time, if found incompetent.—*Common Bench*.

Harrison v. Pearce.

In an action for libel, the writing being in its nature actionable, evidence of damage accruing to the plaintiff, after action brought, is admissible to go to the jury on the question of damages.—*Exchequer*.

Bolt v. Hopkinson.

A. executed a mortgage to B. for present and future advances; he afterwards executed a second mortgage to C., of like description; each mortgagee had notice of the deed to the other. *Held*, that C. mortgage, to the extent of advances actually made, had priority over subsequent advances made by B.—*Court of Appeal in Chancery*.

Findall v. Powell.

It is ordinarily the duty of a steward to keep accounts of his transactions on behalf of his principal. But where, from the education of the steward and the course of dealing between him and his principal, it was evident that this duty could not have been required, a bill for an account, brought by the personal representative of the principal, was dismissed with costs.

Taylor v. Taylor.

A married woman had the beneficial title to certain personal property, which was in the hands of a trustee. By consent, the trustee transferred the property to the husband, who agreed to act as trustee, and pay the income to his wife. By will the husband left the wife a much larger sum than the whole amount of the trust property. *Held*, that the legacy was not a satisfaction of the debt.

Holmes v. Kidd and others.

In the Exchequer Chamber, December, 1858.

An agreement was made between the drawer and acceptor of a bill of exchange, at the time it was given, that the acceptor should deposit with the drawer some canvass as a collateral security for the payment of the bill, with power to the drawer to sell the canvass and apply the money arising therefrom towards the discharge of the amount of the bill, should it not be paid at the proper time. The drawer endorsed the bill after it was overdue, and on nonpayment of the bill when due, sold the canvass, and realized part of the amount of the bill :

Held, (affirming the judgment of the Court of Exchequer,) that the agreement between the drawer and acceptor, as to the canvass, created an equity which attached to the bill in the hands of the endorsee, who received it after it was overdue; and, as the drawer, after the endorsement, had sold the canvass, and retained the proceeds, the endorsee was prevented from recovering on the bill for so much as the canvass realized on its sale.

This was an appeal from the judgment of the Court of Exchequer given in favour of the defendants upon demurrer. The

declaration was upon a bill of exchange for £310, drawn by one Watson upon and accepted by the defendants, and endorsed by Watson to the plaintiff.

Plea, (there were others,)—As to 272*l.* 2*s.* 6*d.*, part of the amount of the bill, that before the endorsement or acceptance of the said bill, the defendants applied to Watson (the drawer) to advance them the sum of 300*l.*, which he agreed to do upon the terms of defendants, accepting the bill in question, and depositing with him, among other things, certain canvas of defendants, as a security for the due payment by defendants of the said bill, Watson to have power of selling the said canvas, and applying the proceeds of such sale in payment of the amount due on the said bill, if the same should not be paid by defendants, and that the bill was accepted and the canvas deposited, on the terms as aforesaid; that after the bill became due Watson sold the canvas, and realized by such sale 272*l.* 2*s.* 6*d.*, and still retained and held the said sum; and further, that the bill was endorsed to the plaintiff after it was overdue, and subject to the proceeds of the equity of the sale of the canvas being applied to the payment and satisfaction of the bill, and without any value or consideration being given by the plaintiff for the said endorsement.

Demurrer to the plea.

The court below held the plea good, and gave judgment for the defendants.

Atherton, Q. C., for the appellant, (the plaintiff below.)—This is the case of an innocent endorsee for value. The drawer had the option, after the arrangement between him and the acceptor, of selling the canvas and paying himself the amount of the bill; or he had the right of endorsing the bill to another. Directly the drawer endorsed the bill he conferred on the endorsee a perfect title to it. He committed a breach of contract by selling the canvas afterwards, for which the acceptor might have his remedy by action, but that does not affect the plaintiff's title to the bill, though taken overdue, for this contract is not an equity directly affecting it; the plaintiff had a good title at the time of the endorsement, and there was consideration between the drawer and acceptor. It might be assumed that the plaintiff knew nothing of the agreement in question. Should this plea be held good, an innocent endorsee who had a good title to the bill at the time of its endorsement to him will, for the first time, have that title defeated.

Brett, contra, was not called upon.

ERLE, J.—I think this is a good plea, and that the judg-

ment of the court below should be affirmed. An agreement seems to have been made between the drawer and acceptor of this bill, that the canvas should be sold by the drawer in the event of the bill being unpaid at maturity; and the drawer held the bill subject to these conditions. On the bill not being paid at maturity, he sells the canvas. It has been asked, is such a sale good, as against the holder of the bill, and are the proceeds received after it was overdue, obtained by such sale, a bar to an action on the bill *pro tanto*? I think they are. The plaintiff took the bill subject to the rights of the acceptor as against the drawer from whom he had it. As soon as the drawer sells the canvas, his rights are defeated *pro tanto*, and the same with the holder who took it from him after it was overdue.

WILLIAMS, J.—I am of the same opinion. The plaintiff took the bill qualified by the equities with which it was subject when he received it; and the plaintiff received this bill incumbered with the equity arising out of the arrangement relating to the canvas.

CROMPTON, J.—The consideration for the acceptance of the bill in this case, was the agreement that if the canvas was sold on the bill becoming due and unpaid, the proceeds should be applied towards its payment. This case is not at all like those of set-off, such as *Burrough v. Moss*, 10 B. & C., 558, where the set-off arises out of collateral matter. Here the equities attach directly to the bill, and what the holder takes from the drawer is in this case a defeasible title only to the bill in question.

CROWDER, J.—I think the plea is an answer to the declaration. The action is within the ordinary rule of a person taking a bill overdue; that it is subject to all the equities attaching to the bill in the hands of the endorser. This is a bill subject to an incumbrance, for the canvas when sold was to be taken as payment. The plaintiff took it incumbered with this equity.

WILLES, J., concurred.

Judgment affirmed.

ABSTRACT OF RECENT ENGLISH DECISIONS.

ARBITRATION.

It is no ground for setting aside an award that the unsuccessful party suffered a surprise, as an arbitrator would have power to postpone the proceedings upon any reasonable application for that purpose. *Solomon v. Solomon*, 28 Ex. 129.

ATTORNEY AND CLIENT.

Where an attorney had been employed by the father of an infant to bring an action for a personal injury to the infant, on the understanding that in the event of his recovering damages, he would not charge extra cost, and he did recover damages, it was held, the infant, by his father, could sue the attorney for the damages, and the attorney could not detain any part for extra costs, even although, through defect in plaintiff's evidence in the original action, and other circumstances, such costs had turned out greater in amount than could have been expected. *Collins v. Brook*, 29 L. J., Ex. 143.

CONTRACT.

A representation made by a party, not knowing that it is false, is binding upon him; and if the other party enters into a contract on the faith of its truth, the court will set aside the same altogether, and not merely rectify it. Though the other party does not examine the books for four years during which the partnership continued, it not being his duty to do so, it will not bar him of relief on the score of negligence or acquiescence. The bringing of an action against the partners, and recovering a verdict against the survivor of them, does not prevent the deceived party from seeking relief in equity. *Rawlins v. Wickham*, 28 L. J., Ch. 188.

If parties to an agreement provide for the settlement of disputes arising out of the contract by the arbitration of persons mentioned in the agreement, or to be determined when the disputes arise, this does not oust the ordinary tribunals of jurisdiction in such disputes. But if a contract provides for the determination of the contractor's claims and liabilities by the judgment of a particular person, everything depends on his decision, and until he has spoken, no right arises which can be enforced either at law or in equity. *Scott v. The Liverpool Corporation*, 28 L. J., Ch. 230.

DEVISE.

Testatrix devised all her real estate to trustees upon trust for three persons for life, with remainder to their issue in tail, "and for default of such issue, then upon trust for the right heirs of my grandfather, Sir T. S., Bart, deceased, by Mary, his second wife, also deceased, forever." It was held, by the House of Lords, affirming the decision of Vice Chancellor Kendersley, that the ultimate limitation created an estate tail special and not a fee simple. *Vernon v. Wright*, 28 L. J., Ch. 198.

DETINUE.

An attorney who receives his client's deed to keep for him and loses it, is *prima facie* liable to an action of detinue on the part of his client. *Reeve v. Palmer*, 28 L. J., Ch. C. P. 168.

FALSE IMPRISONMENT.

To an action for assault and imprisoning plaintiff in a lunatic asylum, plea, that plaintiff had conducted himself as a person of unsound mind and incapable of taking care of himself, and as a person proper to be detained under due care and treatment; that two medical certificates to the effect that plaintiff was of unsound mind and ought to be taken charge of, had been duly given as required by statute; and that defendant had reasonable cause, and did *bona fide* believe the certificates to be true, and plaintiff to be a person of unsound mind and dangerous to be at large, defendant being uncle of plaintiff and a proper person to act in that behalf, caused him to be confined, is bad, as the person ordering the confinement of an alleged lunatic is not protected by 8 & 9 Vict. c. 100, s. 99, and at common law he would only be justified if the person was in fact a lunatic, which the plea did not allege. *Fletcher v. Fletcher*, 28 L. J., Q. B. 134.

LIMITATIONS, STATUTE OF.

Testator, by will, gave all his real and personal property to his wife, out of which he desired that she would discharge all his legal debts and enjoy the surplus for her life; and at her decease the property was to be divided as in the will mentioned. A farm servant of testator left his wages from time to time in his master's hands, and it was agreed between them that the debt thus due should carry interest. Testator died in 1837.

In a suit instituted after death of testator's widow, in 1854, for administration of his estate, the statute of limitations was held not to bar arrears of interest upon the sum left by the servant in testator's hands. *Blower v. Blower*, 28 L. J., Ch. 181.

LANDLORD AND TENANT.

It is only the lessor or the person who stands in the situation of landlord, and not any one who derives title from the lessor, who can, under 4 Geo. 2, c. 28, s. 1, sue a tenant for double value when there has been a holding over after determination of the tenancy. *Blatchford v. Cole*, 28 L. J., C. P. 140.

LEGACY.

Where a sum directed by testatrix to be set apart for an annuity was bequeathed, on death of annuitant, to such of testatrix's nephews and nieces as should be "then" living, and the child and children of such of them as should be "then" dead, it was held, that the children of a nephew who was dead at the date of the will were entitle to participate, and that their interest vested at the death of testatrix. *In re Faulding's Trusts*, 28 L. J., Ch. 217.

MASTER AND SERVANT.

An action is not maintainable by the representative of a deceased workman against his master,, if the deceased's own negligence materially contributed to the injury of which he died, even though the master be guilty of personal negligence. *Semble*, that it is negligence in the manager of a mine to keep in his employ a banksman whom he knew habitually neglected a rule important for the safety of other workmen. *Senior v. Ward*, 28 L. J., Q. B. 139.

WILL.

Testator gave leasehold premises to M. R. for life, and at his death to A. R. and her children; but if they should die without issue, in that case the property was to be divided between four persons, *nominatim*. A. R. had no children either at the death of the testator or of the tenant for life. A. R. took only an estate for life, with remainder to her children.

The rule in *Wild's case* has no application to personalty. *Audsley v. Horn*, 28 L. J., Ch. 293.

BANKRUPTCY.

The duties of an accountant are very well defined in *Re Bunting* 33 L. T. Rep. 208. It will suffice in this place merely to direct to them the reader's attention: it will not be necessary to repeat them.

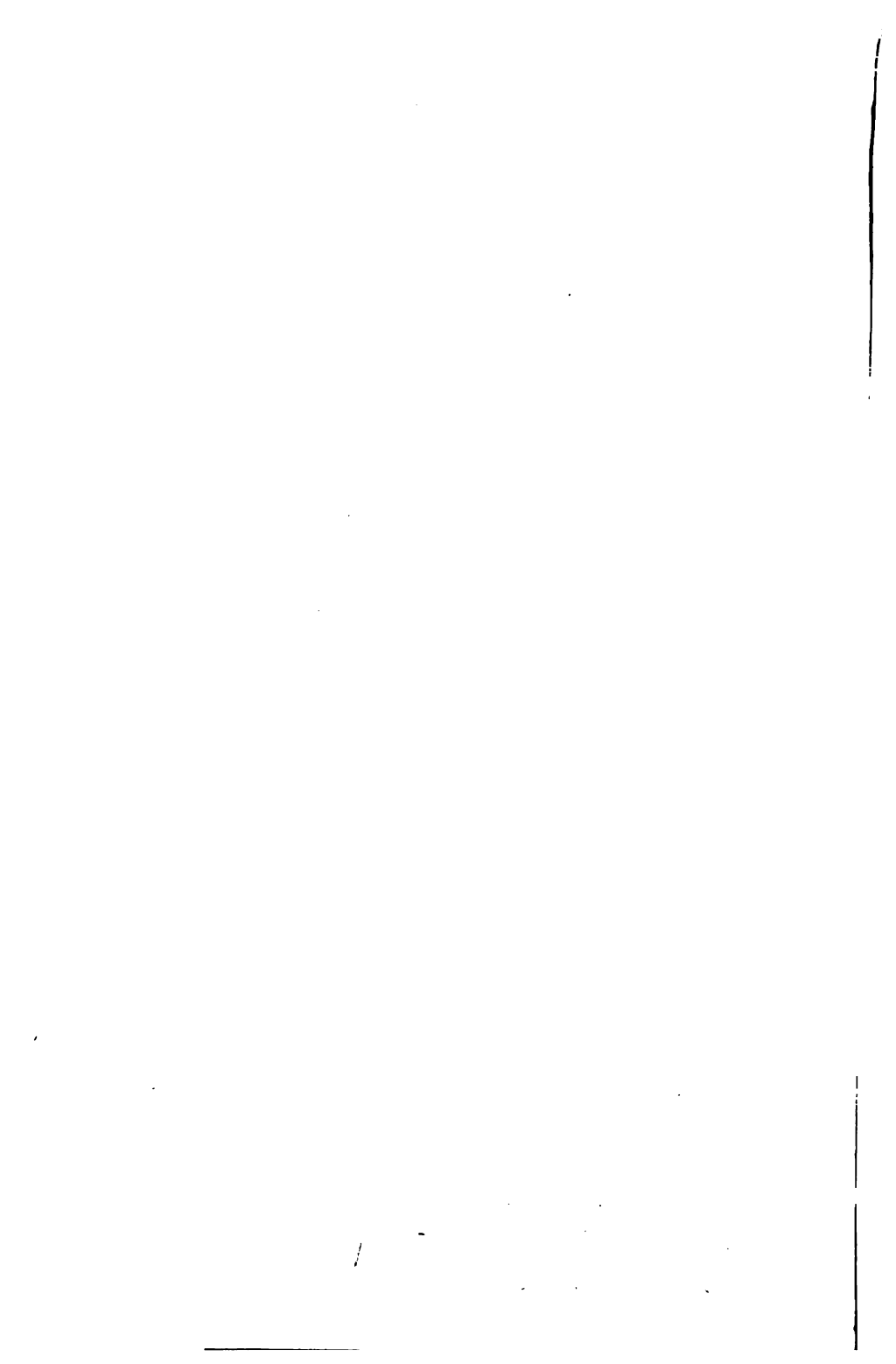
CHARTER-PARTY.

It was held by the Court of Appeal, in *De Mattos v. Gibson*, 33 L. T. Rep. 193, that although a court of equity will not decree specific performance of a charter-party, it will restrain the owner from employing the vessel in a different manner from that agreed upon whether such employment be expressly forbidden or not.

CONTRACT.

In a preliminary conversation between B. and C. as to wool B. had for sale, B. said that, besides his own clip of wool, he had bought the clips of some of his neighbours (naming them;) and that altogether the quantity was 2300 stones, a hundred stones, more or less. Shortly after this C. wrote to B. that D. desired him to offer "for your wool" 16s. per stone, delivered, &c. B. replied accepting the offer. In pursuance of this contract B. tendered 2505 stones, which D. rejected on the ground of excess of quantity. The preliminary conversation was held to be admissible to show to what the contract referred; and by a majority of the court, that the written contract did not make it a condition that the quantity should not exceed 2300 by more than 100 stones; that it was a question for the jury whether the excess was so unreasonable as to entitle the defendant to reject the wool tendered. *Macdonald v. Longbottom*, 33 L. T. Rep. 200.*

* "Law Times," June 18, 1859.







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